Supreme Court, U.S.
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85-556

No. .....

In The

Supreme Court of the United States

October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

v.

HENRY ARTHUR DRAKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether this case presents the factual scenario envisioned by the plurality decision of this Court in *Connecticut v. Johnson*, 460 U.S. 73 (1983) for the proper application of the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967) to alleged *Sandstrom* violations?

2.

Whether there are constitutionally significant differences between the instructions given on the essential elements of the offense in this case, and the instructions given to the jury in *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

3.

The United States Court of Appeals for the Eleventh Circuit has improperly extended this Court's decision in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and has improperly relied on its supervisory powers as a reviewing court in a 28 U.S.C. § 2254 proceeding, examining state trial records for denials of fundamental fairness, by granting federal habeas corpus relief to Respondent based on the closing argument given by the prosecutor.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. THERE ARE CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN THE CHARGE GIVEN ON INTENT IN THIS CASE AND THE CHARGE FOUND TO BE CONSTITUTIONALLY IMPERMISSIBLE IN *FRANCIS v. FRANKLIN*, — U.S. —, 105 S.Ct. 1965 (1985), SO AS TO WARRANT THIS COURT'S GRANT OF CERTIORARI TO DETERMINE THE PARAMETERS OF *FRANCIS v. FRANKLIN, SUPRA*. 13

II. RESPONDENT'S ALIBI DEFENSE REMOVED THE QUESTION OF HIS INTENT FROM ISSUE AND THEREFORE, ANY BURDEN-SHIFTING CHARGE AS TO THE ELEMENT OF INTENT SHOULD HAVE BEEN FOUND TO CONSTITUTE HARMLESS ERROR UNDER THE REASONING EXPRESSED BY THE PLURALITY OPINION OF THIS COURT IN *CONNECTICUT v. JOHNSON*, 460 U.S. 73 (1983). 18

TABLE OF CONTENTS (Continued)

Page(s)

III. BY GRANTING FEDERAL HABEAS CORPUS RELIEF TO RESPONDENT BASED ON THE CLOSING ARGUMENT GIVEN BY THE PROSECUTOR THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS IMPROPERLY EXTENDED THIS COURT'S DECISION IN *DONNELLY v. DeCHRISTOFORO*, 416 U.S. 637 (1974), AND HAS IMPROPERLY RELIED ON ITS SUPERVISORY POWERS RATHER THAN PROPERLY PROCEEDING AS A REVIEWING COURT IN A 28 U.S.C. § 2254 PROCEEDING, EXAMINING STATE TRIAL RECORDS FOR DENIALS OF FUNDAMENTAL FAIRNESS. 20

CONCLUSION 25

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page(s)

CASES CITED:

Caldwell v. Mississippi, — U.S. —, 53 U.S. L.W. 4743 (June 11, 1985) 22

Chapman v. California, 386 U.S. 18 (1967) 18

Conklin v. State, No. 41665 (Georgia June 27, 1985) 21

Connecticut v. Johnson, 460 U.S. 83 (1983) 18

Cupp v. Naughten, 414 U.S. 141 (1973) 14

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 20, 22, 24

Drake v. Francis, 727 F.2d 990 (11th Cir. 1984) 1, 2, 5

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) 2, 5, 13, 15, 20, 21, 24

Drake v. State, 248 Ga. 891, 287 S.E.2d 180 (1982) 3, 4

Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978) 3

Eberhart v. State, 47 Ga. 598 (1873) 20, 21, 23

Francis v. Franklin, — U.S. —, 105 S.Ct. 1965 (1985) 13, 14, 15, 16, 17, 18

Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977) 20, 21

Hawkins v. State, 25 Ga. 207 (1858) 23

Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978) 24

Sandstrom v. Montana, 442 U.S. 510 (1979) 5, 16, 18

STATUTES CITED:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 4

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 31, 1985 and July 23, 1985.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia denying federal habeas corpus relief was entered on December 11, 1982. (Appendix A). The panel opinion of the United States Court of Appeals for the Eleventh Circuit is reported in *Drake*

v. Francis, 727 F.2d 990 (11th Cir. 1984). (Appendix B). The decision of the United States Court of Appeals for the Eleventh Circuit granting Petitioner's and Respondent's suggestions for rehearing *en banc* was entered on April 5, 1984. *Drake v. Francis*, 727 F.2d 1003 (11th Cir. 1984). (See Appendix B). The decision of the *en banc* court granting federal habeas corpus relief was entered on May 31, 1985. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985). (Appendix C). The opinion of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing was entered on July 23, 1985. (Appendix D).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on May 31, 1985. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985). (Appendix C). A petition for rehearing was denied on July 23, 1985. (Appendix D).

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

Respondent, Henry Arthur Drake, was tried in the Superior Court of Madison County, Georgia for the offenses of murder and armed robbery. Following a jury trial, he was sentenced to life imprisonment for the offense of armed robbery and sentenced to death for the offense of murder. On direct appeal to the Supreme Court of Georgia in its mandatory review of the death penalty, Respondent's convictions and sentences were affirmed. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978). A petition for a writ of certiorari from the judgment of the Supreme Court of Georgia was denied by this Court on February 20, 1979.

Next, Respondent filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia and a hearing was held concerning this petition in that court on July 26, 1979. In its order of December 14, 1979, the state habeas corpus court denied Respondent the relief he sought. An application for a certificate of probable cause to appeal which was filed on behalf of Respondent in the Supreme Court of Georgia was denied by that court on January 25, 1980. A petition for a writ of certi-

orari filed in this Court was denied on November 17, 1980.

Respondent filed an extraordinary motion for new trial in the Superior Court of Madison County, Georgia. Following a hearing, Respondent was denied relief on July 24, 1981. On appeal, the Supreme Court of Georgia affirmed the denial of extraordinary relief to the Respondent in *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1982). A petition for a writ of certiorari was denied by this Court on June 7, 1982.

Respondent filed an application for federal habeas corpus relief, pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Athens Division, on August 30, 1982. A motion for stay of execution also filed on August 30, 1982, was granted by the district court on that date.

Following the allowing of the supplementation of the record before the district court, the district court found there were no grounds alleged by the Respondent which entitled him to relief and, therefore, denied his petition for a writ of habeas corpus and entered judgment in favor of the Petitioner on December 15, 1982.

A notice of appeal was filed on behalf of the Respondent in the United States Court of Appeals for the Eleventh Circuit on December 15, 1982. An application for a certificate of probable cause to appeal was granted by the district court on January 17, 1983. Following oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit rendered its decision on February 29, 1984, vacating Petitioner's death sentence and remanding the case for a new sentencing trial based on the panel's

decision that the closing argument by the prosecutor was unconstitutional so as to vacate the death penalty. *See Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984). (Appendix B). Both Petitioner and Respondent filed suggestions for rehearing *en banc* which were granted by the Court on April 5, 1984. *Drake v. Francis*, 727 F.2d 1003 (11th Cir. 1984). (Appendix C). On May 31, 1985, the United States Court of Appeals for the Eleventh Circuit entered its opinion finding that habeas corpus relief should have been granted by the district court as to the contention that the trial court's instructions violated the decision of this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979). The Court also reversed the judgment of the district court denying habeas corpus relief on the issue of the prosecutor's argument, finding that the allegedly improper argument given by the prosecutor rendered Respondent's sentencing proceedings fundamentally unfair. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985). (Appendix D). A petition for rehearing filed on behalf of the Petitioner was denied by the United States Court of Appeals for the Eleventh Circuit on July 23, 1985. (Appendix E).

A review of the evidence presented at Respondent's trial reveals the following:

Mr. C. E. Eberhart resided in Culbert, Georgia and ran a barber shop in that community. (T. 294). Mr. Eberhart lived with his invalid wife a short distance from his barber shop. (T. 276). Mr. Eberhardt was 74 years old and he and his wife drew social security. Mr. Eberhart cashed his social security checks on December 4, 1975, for "something over $300.00" (T. 279-280), and at noon on December 5, 1975, he carried in his bilifold two or three hundred dollars in cash. (T. 273-277).

Just as it was "getting close to dark," on December 5, 1975, a neighborhood boy walked by Mr. Eberhardt's barber shop. Mr. Eberhardt was alone, seated in his barber chair. He and the boy exchanged waves of their hands. (T. 287-288). Shortly thereafter, Mr. Eberhardt began to sweep up the hair on the floor of his barber shop, in preparation for closing the shop. A short, diminutive crew-cut stranger came into the shop for a haircut. (T. 168). This stranger to the community was William (Bill) Campbell.

Mr. Campbell's companion, the Respondent, Henry Arthur Drake, was a life-long resident of Culbert, Georgia, who knew both Mr. Eberhart and his shop. (T. 425). Mr. Drake came in the barber shop in a disguise, wearing a black wig. (T. 168). Respondent demanded the victim's money and told the victim he "was gonna rob him and take his money." (T. 169). Armed with a hammer, the Respondent then beat the victim repeatedly. (T. 170-171). Only after a tremendous struggle had taken place, involving both Mr. Drake, Mr. Campbell and Mr. Eberhart, did the Respondent succeed in subduing Mr. Eberhart.

At 9:00 p.m. that evening, Mr. Eberhart had not returned home, so his worried wife summoned a neighbor to go and check on him. The neighbor found Mr. Eberhart lying on the floor of the shop, with blood all over him. The door to the shop was open and the lights were on. No one else was there when the neighbor arrived. The neighbor notified Sheriff Jack Fortson, who immediately rushed to the scene. (T. 290-293).

The barber shop reflected the tremendous struggle that had taken place there. (T. 353). There was a large quantity of blood all over the area. The area was described as

having a "considerable amount of blood all over the floors, walls, barber chair, cabinets, sink and both doors, with a large pool of blood in the bathroom." Shoe marks, heel marks and wipings evidenced the struggle. (T. 353). At Respondent's trial, photographs were introduced into evidence which depicted the crime scene. (State's Exhibits 15 through 33).

The injuries sustained by Mr. Eberhart were described by various witnesses as follows: "He was down on his knees and sounded like he was trying to talk. He was incoherent and covered with blood. He was hardly recognizable with his head and eyes swollen, and his glasses knocked off." (T. 296). Sheriff Fortson testified that there was one spot in the front of his head that you could "lay a fist in." (T. 308-309).

Mr. Eberhart's daughter saw her father on the night he was injured and stated that his head was swollen five times the normal size and his eyes were closed against his eyelids. (T. 400). One of Mr. Eberhart's attending physicians testified that Mr. Eberhart had a stab wound in the chest, multiple lacerations to his scalp, a very swollen head and was in a comatose state. The physician testified that Mr. Eberhart had been beaten by some blunt type instrument and that the injuries were consistent with those that are made by a claw hammer. (T. 150-152). Mr. Eberhart remained unconscious for a long period of time and finally died as a result of these injuries on March 21, 1976. (T. 153-155, State's Exhibit No. 1).

Sheriff Fortson had examined Mr. Eberhart as he lay in the barber shop. Mr. Eberhart's pants pockets were pulled inside out and emptied. The Sheriff searched, but

could not find any money or a wallet on Mr. Eberhart or in the barber shop. (T. 314-315). A search of the premises outside the barber shop on the night of the crimes revealed that some barber tools were found wrapped up in a barber's cloth on the side of the barber shop. Also found by investigating officers was a claw hammer in the back metal bed of a dump truck (State's Exhibit No. 11), located ten to fifteen feet from the barber shop building. (State's Exhibit No. 5) (T. 296). The barber shop was examined by personnel from the State Crime Laboratory and only three legible fingerprints were lifted from the shop.

Blood samples were also taken from various places in the barber shop. (State's Exhibit No. 4). These samples were examined along with a sample of the blood of the victim by the State Crime Laboratory. Both samples were type "O". (T. 266). Mr. Campbell's blood sample was examined and found to be type "A". One particular sample of blood obtained from outside the front door (State's Exhibit No. 3) was examined and found to be type "A". An examination of the claw hammer (State's Exhibit No. 5) was also found to have type "A" blood on the handle. (T. 263-266). Henry Drake's blood was determined to be type "O". (T. 271).

Sheriff Jack Fortson and Charles Stone of the Georgia Bureau of Investigation investigated the robbery and murder of Mr. Eberhart. (T. 306, 325). Their investigation revealed the following evidence and produced the testimony of the following witnesses:

Curtis James ran a dry cleaning establishment across the street from the victim's barber shop. (T. 282). On

December 5, 1975, at about 5:00 p.m., he saw Mr. Campbell around his car, which was then parked on the street between his business and the victim's barber shop. He closed his dry cleaning establishment at about 6:00 p.m., and as he departed he saw lights on in the victim's barber shop. He testified that Mr. Eberhart weighed around 200 pounds, was six feet tall and was very active for his age. (T. 291).

The victim had received a Timex watch from his daughter on Father's Day in 1975, which he wore regularly. It had easy to read numerals and a "black plastic band." The victim's daughter notified the police that it was missing. (T. 298-340) (State's Exhibit No. 7).

A consent search on December 11, 1975, of the house occupied by Mary Caruth and the Respondent, Henry Drake, in Madison, Georgia, turned up the victim's Timex watch (State's Exhibit No. 7), in a dresser drawer at the house. The watch was examined by a G.B.I. agent and found to have blood on it. (T. 254). Mr. Eberhart's daughter identified the watch (State's Exhibit No. 7) as being the watch she had given to her father and testified that the watchband looked like the band on the watch her father wore regularly. (T. 401, State's Exhibit No. 8).

Mary Caruth testified that she, the Respondent and Mr. Campbell lived together in Colbert, Georgia in a two bedroom house and that the three of them moved from Colbert to Madison, Georgia. (T. 377). On the evening that Mr. Eberhart was killed, the three of them went to Colbert and let Mr. Campbell out to go to the barber shop. (T. 379). Ms. Caruth testified that she and the Respondent went to Drake's mother's home where they stayed until "five minutes until 10:00 p.m." and Ms. Caruth testified

that they then went and picked Mr. Campbell back up at the laundromat across the street from the barber shop. (T. 381-382).

Ms. Caruth testified that the three of them went straight back to Madison to their house, riding together in the front seat of the car. She stated that they did not leave the house during the night, but that the following morning, she and the Respondent went back over to his mother's house in Colbert. (T. 383). Ms. Caruth testified that she heard that Friday night Mr. Eberhart had been beaten up with a hammer on the 9:30 to 10:00 p.m. radio news. (T. 388).

At one point, Ms. Caruth testified that she had not seen Mr. Campbell when he left their house in Madison, Georgia on the next Saturday, but later testified that Mr. Campbell had a gun and threatened to kill her if the Respondent did not drive him from Madison. (T. 386). She testified that Campbell held the gun to her head and that she heard Campbell tell the Respondent, "I believe I killed a man."

However, Ms. Caruth's testimony did implicate the Respondent in the crime because she testified that the Respondent had a knife with black handles and a tree-shaped figure on it. (T. 390). This description fit one of the knives found in the barber shop.

William Campbell testified against the Respondent. He stated that he knew the Respondent and Ms. Caruth and they all lived together for a month or two in Colbert, Georgia, and then moved to Madison, Georgia. (T. 157-158). He stated that at about 5:00 p.m. on December 5, 1975, the three of them drove from Madison to Colbert, so that he could get a haircut in a small barber shop located

in a brick building across from the laundromat. (T. 160-162). When asked if he saw the Respondent at the barber shop, Mr. Campbell did not answer until the question was repeated three times, at which time he stated "ain't got nothing to say about that." (T. 167). Mr. Campbell stated that he was getting his hair cut and did not recognize the Respondent when he came in, because the Respondent had a wig on his head. (T. 168). Mr. Campbell stated that the Respondent told the victim that he "was gonna rob him and take his money" and that he then hit the barber with a hammer. (T. 168).

Mr. Campbell stated that he told the Respondent not to hit the old man and to leave him alone, at which point Respondent hit him with the hammer. (T. 169). Mr. Campbell testified that the Respondent hit the barber more than one blow with the hammer. He further testified that he saw some knives at the barber shop. (T. 171). Mr. Campbell observed the Respondent taking something out of the pockets of the victim. (T. 174). Mr. Campbell stated that they remained at the barber shop about ten to fifteen minutes and that although he had gotten some blood on himself during this time, he washed it off and then returned to Madison. (T. 172-173).

Mr. Campbell identified the victim's watch and stated that Henry Drake had it. The Respondent did not have it before the murder and robbery, but Mr. Campbell saw him wearing it the next morning. (T. 173, 183). Mr. Campbell also stated that the Respondent had a hammer that night and that Respondent had hit him and the victim with it. Later, Mr. Campbell had picked up this hammer and threw it in a truck parked at the barber shop. (T. 175).

Mr. Campbell stated that Mary Caruth was behind the barber shop during the incident there. Their car was parked at a store and after the crimes at the barber shop, they all got in the car and left together, driving to a graveyard and drinking beer. (T. 176-177). Mr. Campbell stated that he went to sleep and when he woke up they were back in Madison. (T. 178). Beer bottles fitting the description given by Campbell were found by the Sheriff and a G.B.I. agent in the cemetery in Colbert. (T. 317-318, 323).

Campbell testified that the morning after the crimes, Ms. Caruth and the Respondent went to Colbert. Upon their return, they told him he had to leave Madison and took him to Atlanta, letting him out on Peachtree Street and giving him a $10.00 bill. (T. 179-180).

On cross-examination, Mr. Campbell testified that he tried to pull the Respondent off of the victim. The victim reached up and pulled the wig from Respondent's head, stating, "Lord sakes, I didn't think you would do that." (T. 208). Mr. Campbell also stated that neither he nor the Respondent had any money the Friday afternoon before the robbery. (T. 237).

G.B.I. Agent Stone testified as to a statement that the Respondent had made prior to his arrest in which the Respondent claimed that he had let Mr. Campbell out at the barber shop to get a hair cut and that he and Mary Caruth had gone to his mother's house and stayed about two hours, later coming back and picking up Mr. Campbell in front of the laundromat. (T. 342). The Respondent also took the stand in his own defense at the trial and made a similar statement to the jury.

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), granting federal habeas corpus relief on the *Sandstrom* issue and the issue of alleged improprieties in the prosecutor's closing argument during the sentencing phase of Respondent's trial.

REASONS FOR GRANTING THE WRIT

I. THERE ARE CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN THE CHARGE GIVEN ON INTENT IN THIS CASE AND THE CHARGE FOUND TO BE CONSTITUTIONALLY IMPERMISSIBLE IN FRANCIS v. FRANKLIN, — U.S. —, 105 S.Ct. 1965 (1985), AND THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE PARAMETERS OF FRANCIS v. FRANKLIN, SUPRA.

The United States Court of Appeals for the Eleventh Circuit reviewed the trial court's instructions on intent and employing the analysis utilized by this Court in *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965 (1985), found that ". . . a reasonable juror could well have concluded that Drake bore the burden of proof on the necessary element of intent. The relevant portions of the jury's instructions cannot be distinguished from the jury charge in *Francis v. Franklin*, which we find to be controlling." *Drake v. Kemp*, 762 F.2d 1449, 1453 (11th Cir. 1985).

Petitioner submits that a narrow application should be given to this Court's decision in *Francis v. Franklin*,

supra, and that each instruction alleged to be impermissibly burden-shifting should be examined in the context of the trial court's charge as a whole, as required by this Court's decision in *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). It is only when the trial court's instructions are examined as a whole, that it can be determined if a habeas corpus petitioner's due process rights have been violated because there is allegedly burden-shifting language contained therein.

Although the United States Court of Appeals for the Eleventh Circuit found that the jury instructions could not be distinguished from the charge invalidated by this Court in *Francis v. Franklin, supra,* Petitioner submits that there are constitutionally significant differences between the two charges and that this case serves to illustrate the unnecessarily broad application being given to this Court's decision in *Francis v. Franklin, supra*, so as to grant relief to habeas corpus petitioners serving death sentences in Georgia.

Petitioner submits that a review of the trial court's charge as a whole clearly establishes constitutionally significant differences in the instructions given in Respondent's case and that given to the jury in *Francis v. Franklin, supra.* Petitioner respectfully submits that federal habeas corpus relief should not have been granted simply because the charge contains some language which is the same as that in *Francis v. Franklin,* i.e., "I charge that the acts of a person of sound mind and discretion are presumed to be the product of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted." Significantly, the chal-

lenged portion of the charge, read in context, clearly informed the jury of their duty concerning finding intent as an essential element of the offense of murder under Georgia law. The charge in context reads as follows:

> Ladies and Gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted. I charge you, however, that a person will not be presumed to act with criminal intent but the trials [sic] of fact may find such intent from consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act to which the accused is here prosecuted. You are the triers of the fact; therefore it is a question of fact solely for your determination as to whether or not there was a criminal intent on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now, while a criminal intention may be proven in more than one way, the question of whether the defendant did act with criminal intention is finally and always a question for you, the jury, to determine.

(T., p. 484-485).

Petitioner submits that the latter portion of the above-stated charge on intent was not in any form contained in the charge found to be impermissible by this Court in *Francis v. Franklin, supra.* The entire charge to the jury at the guilt-innocence phase of Respondent's trial is set out in the Appendix to the Eleventh Circuit's opinion in *Drake v. Kemp,* 762 F.2d 1449 (11th Cir. 1985) (Appendix

C). Petitioner submits that as Justice Powell noted in his dissenting opinion in *Francis v. Franklin, supra,* the portion of the charge challenged here, ". . . is but a small part of a lengthy charge, other parts of which clarify its meaning." *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965, 1978 (1985). There is additional clarifying language, cited above, which was not present in *Francis v. Franklin* and which clearly informs a reasonable juror of his duty with reference to determining the issue of whether the essential element of intent has been proven by the state. Even more so than the charge in *Francis v. Franklin, supra,* the trial court in this case "went well beyond" the typical general instructions on the burden on the state and the defendant. *Id.* at 1979. In fact, the trial court clearly informed the jury that it was their duty as the trier of fact to determine whether there was *criminal* intent on the part of the defendant, rather than simply "general" intent.

Merely because some of the same language is included in this charge as was contained in the charge given to the jury in *Francis v. Franklin, supra,* this does not end the analysis of the Eleventh Circuit Court of Appeals in reviewing a state court conviction in a federal habeas corpus context. Rather, each charge must be viewed as a whole and in the context of the trial in determining whether or not a *Sandstrom* violation has occurred, rather than simply isolating certain allegedly objectionable language and determining that the language, in and of itself, constitutes a due process violation.

Respondent also submits that all of the elements are present in this charge which would sustain the conclusion that a reasonable juror would not have viewed this charge

as placing the burden on the Respondent to rebut a presumption of *criminal* intent. In addition to the language contained in this charge, which was not contained in *Francis v. Franklin, supra,* this charge also contains many of the instructions found to be significant by Justice Powell in his dissenting opinion in *Francis v. Franklin, supra,* as well as Justice Rehnquist's dissenting opinion. Specifically, the charge contained the specific instruction that a person will not be presumed to act with criminal intent. (T., p. 484). The charge contained repeated references to the presumption of innocence resting in favor of the Respondent, as well as charges on reasonable doubt. (T., p. 480-481; 492-493). There was also a specific charge on circumstantial evidence which clearly defined the jury's duty with regard to reviewing such evidence. (T. 488-489). *See Francis v. Franklin, supra* at 1979.

Based on all the above and foregoing, Petitioner asks this Court to grant a writ of certiorari to review the application of the reasonable juror test of *Sandstrom v. Montana, supra,* in light of *Francis v. Franklin, supra.* Pettioner also submits that *Francis v. Franklin* is being given widespread application as it is being found to warrant the granting of federal habeas corpus relief based on isolating specific language in the charge without regard to the charge as a whole.

II. RESPONDENT'S ALIBI DEFENSE REMOVED THE QUESTION OF HIS INTENT FROM ISSUE AND, THEREFORE, ANY BURDEN-SHIFTING CHARGE AS TO THE ELEMENT OF INTENT SHOULD HAVE BEEN FOUND TO CONSTITUTE HARMLESS ERROR UNDER THE REASONING EXPRESSED BY THE PLURALITY OPINION OF THIS COURT IN CONNECTICUT v. JOHNSON, 460 U.S. 73 (1983).

Although this Court expressly left open the question of whether a *Sandstrom* error can ever be harmless in *Francis v. Franklin*, — U.S. —, 105 S.Ct. at 1977 (1985), the plurality opinion of this Court in *Connecticut v. Johnson*, 460 U.S. 83 (1983) envisioned that the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967), might be applicable, at the very least, in certain specified circumstances. This Court endorsed the application of the harmless error rule in the following circumstances:

> [A] *Sandstrom* error may be harmless if the defendant conceded the issue of intent . . . in presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

Connecticut v. Johnson, supra at 87.

Petitioner submits that this is exactly the type of situation in which alleged *Sandstrom* errors should be found to be harmless, even though there may be other circumstances which require the application of the harmless error rule to *Sandstrom*-type errors. Petitioner con-

tends that Respondent conceded the issue of intent by Respondent's claim of non-participation in the crime. Respondent's intent to murder or Respondent's intent to aid and abet the crime had been removed as a contested issue for the jury to resolve by Respondent's presentation of an alibi defense. Therefore, criminal intent of any type was not an issue for the jury, as the finder of fact, to determine, and any allegedly burden-shifting charge on intent was therefore not a factor which could have in any way contributed to the jury's verdict of guilt. An allegedly burden-shifting charge on intent, where intent is not an issue for the jury's determination, it is respectfully submitted, is exactly the type of situation in which a harmless error analysis should be appropriately applied.

In this case, the crucial determination to be made by the jury was the identity of the person or persons who murdered C. E. Eberhart, not the "intent" of the person involved in the murder. The jury was to determine whether or not the Respondent and codefendant Campbell were equally culpable in committing the crime, whether both of the men were culpable, or whether neither of the men was culpable. With specific respect to the Respondent, the jury had to determine the credibility of the testimony of coindictee Campbell implicating Respondent, as well as whether the physical evidence in the case sufficiently established the identity of Respondent as the perpetrator of the murder and armed robbery of the victim. Therefore, criminal intent to commit the crime was not an issue, as it was undisputed that whoever committed the crime did so with criminal intent and malice.

Petitioner submits that this Court should grant a writ of certiorari to review the applicability of the harmless error rule to alleged *Sandstrom* violations, in situations

ments could rise to the level of an error of constitutional dimension, merely because the cases expressing these sentiments were cited to the trial court in the presence of the jury. In *Caldwell v. Mississippi*, — U.S. —, 53 U.S.L.W. 4743, 4751 (June 11, 1985), Justice Rehnquist noted in his dissenting opinion that:

> There is nothing wrong with urging a capital sentencing jury to disregard emotion and render a decision based on the law and the facts. Despite the court's rhetorical references to the need for "reliable" sentencing decisions rendered by jurors that comprehend their "awesome responsibility," I do not understand the Court to believe that emotions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions.

Id.

Therefore, Petitioner submits that both under Georgia law and under federal constitutional law, as promulgated by this Court, there is nothing constitutionally impermissible in arguing to the jury that their verdict at the sentencing phase of a death penalty case should not be based upon "sickly sentimentality."

As this Court also noted in *Caldwell v. Mississippi, supra,* the prior decision of this Court in *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974), "does clearly warn against holding every improper and unfair argument of a state prosecutor to be a federal due process violation. ..." *Id.* at 4748. Similarly, Justice Rehnquist noted in his dissenting opinion in *Caldwell v. Mississippi, supra,* "*Donnelly, Zant,* and *Barkley,* teach that a death sentence need not be vacated in every case where the proced-

ures by which it is imposed are in some way flawed." *Id.* at 4750.

During the state's closing argument at the sentencing phase of Respondent's trial in Madison County, Georgia in urging that the death penalty was the appropriate sentence in this case, the prosecutor began by reading from the two opinions of the Georgia Supreme Court:

> If Your Honor please, in connection, in my urging you to submit this to the jury, the State of Georgia, the Supreme Court of Georgia in *Hawkins v. State,* in 25 Ga., page 207, the Court, in upholding the murder and the death sentence in that case said this:
>
> "Human life is sacrificed at this day throughout the land with more indifference than the life of a dog, especially if it be a good dog." They went on to hold that Cain was the first murderer, but who was the last is known only to those who have read this morning's papers. And they said, "If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness."
>
> If your Honor please, in *Eberhart v. State,* 47 Ga. [598], page 610, the Justice of the Supreme Court of Georgia said this, in connection with the death sentence for murder: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society." The Court went on to say, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist on mercy to society." And if your Honor please, the Court went on to hold, and

> in that case, that for criminals to go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which the bloody deed occurs. They said that a "stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is also the surest mode to prevent the commission of offenses."

Drake v. Kemp, supra at 1458-1459. Reviewing the charge as a whole, the prosecutor was properly arguing his position, i.e., that the facts warranted the death penalty in this case and that the jury should not exercise its discretion and recommend a life sentence for the Respondent.

With respect to whether or not the fact that the words were attributed to a Chief Justice of the Georgia Supreme Court unduly influenced the jury so as to violate Respondent's constitutional rights, Petitioner submits that the Supreme Court of Georgia in *Presnell v. State*, 241 Ga. 49, 62, 243 S.E.2d 496 (1978), correctly noted that, "written words of a since deceased jurist could not have inflammed (sic) the jury more than the facts of the case themselves." In the context of the argument as a whole, Petitioner submits the references to the cases did not unduly influence the jury so as to violate Respondent's due process rights.

Petitioner submits that if the principles set forth by this Court in *Donnelly v. DeChristoforo, supra,* had been properly followed by the Eleventh Circuit and had the Eleventh Circuit exercised its authority, not as a supervisory court, but rather as a reviewing court in a habeas corpus proceeding, examining the record for denials of fundamental fairness, federal habeas corpus relief would not have been granted to the Respondent. The significance of this question is reflected by the fact that a petition for certiorari has already been filed in this Court involving

this same issue, in which federal habeas corpus relief was granted to a Georgia defendant on death row based on this same type of argument, referring to these two decisions of the Supreme Court of Georgia. *See Kemp v. Potts,* Case No. 85-337. Therefore, the manner in which the circuit courts review the argument of state prosecutors in death penalty cases presents an exceptional question as to which this Court should grant a writ of certiorari.

—o—

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Drake v. Kemp,* 762 F.2d 1449 (11th Cir. 1985).

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CIVIL ACTION NO. 82-99-ATH

HENRY ARTHUR DRAKE,

Petitioner,

vs.

ROBERT O. FRANCIS, Warden,

Respondent.

JUDGMENT

Pursuant to the Order of this Court dated and filed December 15, 1982, and for the reasons stated therein, the petition for a writ of habeas corpus is denied, and

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE RESPONDENT.

This 15th day of December, 1982.

GIRARD W. HAWKINS, Clerk

By: /s/ Donna N. Phillips
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CIVIL ACTION NO. 82-99-ATH

HENRY ARTHUR DRAKE,
Petitioner,

vs.

ROBERT O. FRANCIS, Warden,
Respondent.

(Filed December 15, 1982)

OWENS, District Judge:

Henry Arthur Drake was tried and convicted in the Superior Court of Madison County on September 1, 1977, for the December 5, 1975, barbaric slaying — legally called murder and armed robbery — of C. E. Eberhart of Colbert, Georgia, and sentenced by a jury of his peers to die. Having unsuccessfully appealed directly and by writ of habeas corpus in the courts of this State, he now seeks to overturn his conviction pursuant to a law passed by Congress — 28 U.S.C. § 2254 — which permits him to come into this United States District Court and attack his conviction on constitutional grounds. Under said congressionally passed law it is the duty and responsibility of the judges of this court to consider his constitutional contentions.

The law in question, 28 U.S.C. § 2254, provides:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State

> court *only on the ground* that he is in custody in *violation of the Constitution* or laws or treaties *of the United States.*" (emphasis added).

and thus permits this court to consider only United States Constitutional and legal issues.

Evidentiary Hearing

Petitioner first moves this court to conduct an evidentiary hearing to receive and consider evidence that was neither received nor considered in the courts of this State. Subparagraph (d) of § 2254 provides:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —
>
> (1) that the merits of the factual dispute were not revolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court *was not adequate to afford a full and fair hearing;*
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant *did not receive a full, fair, and adequate hearing* in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and *the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:*

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous." (emphasis added).

Under the concept of this portion of § 2254, unless it appears to this court that an evidentiary hearing is needed on account of deficiencies in the State court proceedings, petitioner has the burden of establishing that he did not receive a full, fair and adequate State court hearing; that

the State factfinding procedure was not adequate to afford a full and fair hearing; or that the State court factual determinations are not fairly supported by the record.

The purpose of § 2254 is to permit United States District Courts to review State court criminal proceedings for possible constitutional error. Absent § 2254(d)(1) through (8) shortcomings in the State court proceedings, § 2254 is not intended to permit this court to hear and consider evidence that was not presented to the State court.

This court has carefully considered petitioner Drake's trial and State habeas transcripts and appellate records. Petitioner has not shown and this court has not found any deficiency in the State court proceedings which would entitle petitioner to an evidentiary hearing in this court. Accordingly, this court declines petitioner's motion for an evidentiary hearing.

As this court is required to do, a review of the State court proceedings — trial and appellate — has been conducted and no United States constitutional deficiency has been found. Only two of the issues raised by petitioner and found to be lacking in merit are worthy of discussion.

(A) *Insufficiency of the Evidence*

Petitioner urges as a basis for habeas corpus relief that there was insufficient evidence to support his conviction. The Georgia Supreme Court considered petitioner's claim that the verdict in his case was against the weight and sufficiency of the evidence, but applying the "any evidence" standard, that court affirmed his conviction. *Drake v. State,* 241 Ga. 583, 585 (1978). Petitioner correctly points out that the test enunciated by the Supreme Court

of the United States is whether there is sufficient evidence to justify a rational trier of the facts to find petitioner guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).[1]

More specifically, the court in *Jackson v. Virginia, supra*, stated the relevant considerations as follows:

> ". . . Instead, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 US, at 362, 32 L.Ed.2d 152, 92 S.Ct. 1620. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charges, the factfindinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." Id. at —, 99 S.Ct. at —, 61 L.Ed.2d at 573, 574 (footnotes omitted).

After reviewing the evidence of record, this court finds that Campbell's testimony constitutes direct evidence supporting petitioner's conviction.[2] Other evidence supporting petitioner's conviction was fairly stated by the Georgia Supreme Court as follows:

> "The state's case rested largely on Campbell's testimony, since there was no other direct evidence, and little circumstantial evidence of Drake's participation in the crime. Campbell's testimony was impeached by proof of prior inconsistent statements and

prior felony convictions. The testimony was corroro-rated in a variety of particulars by Mary Caruth's testimony, Drake's own testimony, and some physical evidence, including a knife found at the scene which matched the description of a knife belonging to Drake.

"The victim was over 70 years old, but he was healthy and there was evidence of a tremendous struggle in the barbershop. Campbell was in his sixties, and suffered so severely from asthma and emphysema that he could not exert himself strenuously. Drake, on the other hand, was healthy and in his thirties. From this the state argued that Drake must have been the one who actually beat the victim.

"Mary Caruth's testimony in general supported Drake's alibi defense that he was at his mother's house in Colbert at the time of the offense. However, Caruth's testimony was impeached by prior inconsistent statements. Drake and his mother also testified in support of his alibi." *Drake v. State, supra*, at 584, 585.

"Appellant was connected to the crime by the distinctive pocketknife found at the scene which matched the description of appellant's knife. In addition, it was established without dispute that appellant and Mary Caruth drove Campbell to the barbershop, drove him home with them after the robbery, and later drove him to Atlanta so that he could flee the state even though by that time Drake admittedly knew of Campbell's involvement in the crimes. This evidence was sufficient corroboration of Drake's involvement in the crimes. See Birt v. State, 236 Ga. at 825." *Drake v. State supra* at 586.

Applying the test in *Jackson v. Virginia, supra*, the court finds that ". . . after viewing the above described evidence, in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, supra*, at —, 99 S.Ct. at —, 61 L.Ed.2d at 573.

Petitioner also urges that there is insufficient independent corroborative evidence of Campbell's testimony.[3] This court disagrees. The evidence which corroborates Campbell's testimony, although circumstantial, is sufficient to connect petitioner with the crimes or lead to the inference of his guilt.

(D) *Disproportionality and Excessiveness of Death Sentence for Felony Murder*

Petitioner urges that because the jury returned a general verdict it cannot be determined whether he was convicted and sentenced to death on a felony-murder or malice-murder rationale. The jury was charged on murder, armed robbery, and aiding and abetting. Under petitioner's theory, it is possible that the jury only determined that petitioner aided and abetted in the armed robbery which would render petitioner guilty of the crime of armed robbery and that because a homicide occurred during the armed robbery, the jury found petitioner guilty of murder.[4] Petitioner urges that there is no way to determine intent and that therefore under *Enmund v. Florida,* — U.S. —, 102 S.Ct. —, 73 L.Ed.2d 1140 (1982), a death sentence is excessive and disproportionate.

The court notes the following portion of *Enmund v. Florida, supra:*

> "Here the robbers did commit murder: but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery

> and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 US 586, 605, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26 (1978) (footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender.' Woodson v. North Carolina, 428 US 280, 304, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment." Enmund v. Florida, 73 L.Ed.2d at 1152.

As indicated by the above language from *Enmund, supra,* whether the death penalty results in constitutional deprivation depends upon individual culpability. In *Enmund,* the Supreme Court of Florida had determined that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape.

Here, the Georgia Supreme Court noted not only the direct evidence of Campbell's testimony which establishes petitioner's direct participation in the crimes but also found that the testimony was corroborated by Mary Caruth's testimony and Drake's own testimony. Additionally,

there was physical evidence found at the scene from which an inference could be drawn that petitioner was directly involved in Mr. Eberhart's death. Clearly the evidence is such that an inference could be drawn that petitioner committed the murder. This distinguishes the situation from *Enmund* which involved the constitutionality of imposing the death penalty on one who could have only been found to have aided and abetted in an armed robbery and murder by being the "pick-up man."

The petitioner having raised no other constitutional grounds entitling him to relief, his petition for a writ of habeas corpus is DENIED.

SO ORDERED, this 15th day of December, 1982.

/s/ Wilbur D. Owens, Jr.
United States District Judge

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[1]In response to this ground raised by petitioner in his State court proceedings, the Superior Court of Butts County stated as follows in its order of December 14, 1979, at p.5:

> "It has long been the rule that sufficiency of the evidence is not an issue in a State habeas corpus proceeding. Fryer v. Stynchcombe, 228 Ga. 576 (1972). While it could be, as Petitioner asserts, that Jackson v. Virginia now requires a different standard, it is inconceivable that the Supreme Court of the United States would require the appellate courts of every state to relitigate the issue of sufficiency of the evidence in every conviction in which a prisoner is still under restraint. But regardless of this practical problem which would be involved in applying such a new standard to Petitioner's case, it is the view of this Court that there was evidence from which a rational trier of fact could have found Petitioner guilty beyond a reasonable doubt. The State had an eye witness who testified that Petitioner beat the victim to death with a claw hammer. The fact that Petitioner now does not consider that witness (William Campbell) credible is irrelevant to the inquiry made by a habeas court. The jury apparently believed Mr. Campbell's testimony, and Jackson v. Virginia,

supra, has nothing to do with the traditional notion that credibility of witnesses is for the jury to determine. The allegations of Count Six are without merit."

[2]Petitioner urges in another ground raised in his habeas petition that his Fifth and Fourteenth Amendment rights have been violated by the denial of his extraordinary motion for a new trial. Petitioner's motion for a new trial was based on Campbell's changing his testimony to now state that he, not Drake, was responsible for Mr. Eberhart's death.

As stated in *Drake v. State*, 248 Ga. 891 at 894, "[t]he law is settled that a post-trial declaration by a state's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 S.E.2d 597) (1981); Sutton v. State, 238 Ga. 336, 338 (232 S.E.2d 569) (1977); Fowler v. State, 187 Ga. 406 (1 S.E.2d 18) (1939); Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 S.E.2d 672) (1974); Code Ann. § 70-204."

A review of the record indicates that this is not the first instance in which Campbell has changed his testimony and supports the Georgia Supreme Court's finding that Campbell's testimony now would only serve to impeach his past testimony. Petitioner cites no cases to this court supporting his assertion that denying his motion for new trial will result in a violation of his Fifth or Fourteenth Amendment rights.

In sum, this court finds that the motion for new trial was properly denied and finds no constitutional violation such as would provide a basis for granting habeas corpus relief.

[3]*Birt v. State*, 236 Ga. 824 (1976) at 824, 825 provides as follows:

"Code Ann. § 38-121 provides that the testimony of a single witness is generally sufficient to establish a fact, except that to convict in any case of felony where the only witness is an accomplice, corroborating circumstances are required. This Code section deals with the sufficiency of the evidence (testimony and corroboration) to convict in felony cases where an accomplice testifies as a witness.

"The leading case interpreting and applying this Code section and the cases decided under it is West v. State, 232 Ga. 861 (2) (209 SE2d 195) (1974), which should be considered in full and which we quote in part (pp. 864, 865): 'The law is settled in Georgia that the corroborating facts or circumstances must connect the defendant to the crime or lead to the inference that he is guilty, and that such

corroboration must be independent of the accomplice's testimony. Allen v. State, 215 Ga. 455 (111 SE2d 70); Price v. State, 208 Ga. 695 (69 SE2d 253). . .

'When an accomplice's testimony is corroborated in material part, other uncorroborated testimony may be believed by the jury, with one important exception. Under § 38-121, testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. One who is guilty of a crime in which he participated will always be able to relate the facts of the case and if the corroboration goes only to the truth of that history, without identifying the person accused, it is really no corroboration at all.

'Therefore, a distinction must be made between evidence which tends to prove the truth of the accomplice's general testimony and that which tends to prove the identity and participation of the accused . . . [A]n accomplice's testimony is more believable when it is corroborated in material part. But insofar as the participation and identity of the accused is concerned, there must be independent corroborating evidence which tends to connect the accused with the crime.

'Simply because an accomplice's testimony is corroborated in most details, it does not follow that his testimony alone as to the identity and participation of the accused is sufficient to justify conviction.' A host of cases can be found in support of this decision. See Allen v. State, 215 Ga. 445 (2) (111 SE2d 70) (1959), and cases cited.

"Thus, regarding sufficiency (as opposed to admissibility) the testimony of an accomplice must be corroborated by independent evidence as to the identity and participation of the accused which tends to connect the accused with the crime or leads to the inference that he is guilty. As stated in Allen v. State, supra, the corroborating facts and circumstances must do more than merely cast on the defendant a grave suspicion of guilt."

[4]The court finds that petitioner's theory is supported by the fact that in Campbell's trial, the State's theory was that Drake was probably just the "pick-up man." In Drake's trial, evidence was revealed that Campbell was not physically able to participate in a struggle such as the evidence indicated had occurred. The State in Drake's trial argued that Drake had to have conducted the brutal beating. Petitioner urges in a separate ground that this apparent change in theory constitutes prosecutorial misconduct or knowledgeable use of false or perjured testimony. The court finds no merit in such contentions.

APPENDIX B

Henry Arthur DRAKE,
Petitioner-Appellant,

v.

Robert O. FRANCIS,
Respondent-Appellee.

No. 83-8047

United States Court of Appeals,
Eleventh Circuit.

Feb. 29, 1984.

Opinion on Granting of Rehearing
April 5, 1984.

Petition for writ of habeas corpus was filed by Georgia inmate who had been convicted, 241 Ga. 583, 247 S.E.2d 57, of murder and armed robbery. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., C.J., denied petition, and inmate appealed. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) bare assertion of third-party confession following conviction was insufficient to warrant habeas relief; (2) there was no due process violation in prosecuting inmate under different theory than that propounded in fellow defendant's trial; (3) inmate failed to make out due process claim arising out of prosecution's alleged knowing use of perjured testimony; (4) prosecutor's closing remarks during sentencing hearing, in which prosecutor read from two nineteenth century Georgia cases and then drew attention to case of a well-known executed convict, so inflamed passions and prejudices of jury that death penalty had to be vacated and cause remanded for resentencing even if remarks, as asserted by

prosecution, were directed to court and not to jury; (5) instructions did not unconstitutionally shift burden of proving intent from state to inmate; (6) submitted statutory aggravating circumstance was a proper consideration for jury; and (7) jury charge in sentencing phase was sufficiently clear to pass constitutional muster.

Affirmed in part, reversed in part, and remanded.

Johnson, Circuit Judge, dissented and filed an opinion.

Mary J. Wilkes, Atlanta, Ga., for petitioner-appellant.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before JOHNSON and HENDERSON, Circuit Judges, and ALLGOOD*, District Judge.

ALBERT J. HENDERSON, Circuit Judge:

Henry Arthur Drake and William Campbell were convicted at separate trials in the Superior Court of Madison County, Georgia of the murder and armed robbery of C.E. Eberhart.

At approximately 9:00 p.m. on the evening of December 5, 1975, Eberhart, a local barber, was discovered lying comatose in a pool of blood on the floor of his Colbert, Georgia barber shop. Although he was rushed to the hospital, Eberhart never regained consciousness but instead lingered in a coma until his death several months later.

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Eberhart apparently had been injured by a stab wound and numerous blows to his head and body from a blunt object. A bloody claw hammer was discovered behind the shop and a pocket knife, distinctive in appearance and allegedly belonging to Drake, was found on the shop floor.

Although he was seventy-four years old, Eberhart was a large man and in excellent health. Blood was smeared throughout the barber shop, evidencing the struggle that had ensued from the attack. Although Eberhart had cashed $300.00 in checks earlier in the day, no cash was found on his person and his Timex watch was missing.

Earlier in the evening of Eberhart's death, a neighboring proprietor had noticed William Campbell lingering around the area. From the time of his release from prison, Campbell had been living with Drake, and his girlfriend, Mary Carruth, at Carruth's house in Madison, Georgia. The police tracked Campbell to Carruth's home and searched it after obtaining Carruth's consent. In a dresser drawer of the room formerly occupied by Campbell, the police uncovered a Timex watch later identified as belonging to Eberhart.

By the time the police arrived at Carruth's home, Campbell had already fled the state but subsequently was arrested in Virginia. Drake also was arrested. Both men were charged in Eberhart's death. Campbell was tried first and was convicted of murder and armed robbery. At his trial a year later in the Superior Court of Madison County, Georgia, Drake was convicted of the same offenses. On direct appeal, the Supreme Court of Georgia affirmed. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), *cert. denied*, 440 U.S. 928, 99 S.Ct. 1265, 59 L.Ed.2d 485

(1979). Subsequently, in July of 1979, Drake filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. After a hearing on the merits, the court denied relief. The Georgia Supreme Court declined to grant Drake's application for a certificate of probable cause to appeal and the Supreme Court of the United States denied certiorari.

Two years later, Drake filed an extraordinary motion for a new trial in the Madison County Superior Court alleging the discovery of new evidence that would prove his innocence. The new evidence was in the form of an affidavit by William Campbell, the prosecution's star witness against Drake, repudiating his previous testimony implicating Drake. After a hearing, during which Campbell testified substantially to the same facts contained in his affidavit, the trial court denied the motion and the Georgia Supreme Court affirmed. *Drake v. State,* 248 Ga. 891, 287 S.E.2d 180, *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1322 (1982).

In August of 1982, Drake filed this petition for a writ of habeas corpus pursuant to the provision of 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia. The petition was denied without a hearing. This appeal followed asserting seven different grounds for relief.

I. The Newly Discovered Evidence

As stated earlier, each defendant was tried separately.[1] At Campbell's trial, the state pursued the theory that he

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1. Although originally scheduled to stand trial together, Drake's trial was postponed for a year because of a successful grand jury challenge.

was the actual murderer. Campbell maintained his innocence and testified instead that Drake had killed Eberhart. Nevertheless, the jury returned a verdict of guilty against Campbell and imposed the death penalty.

A year later, Drake went to trial. Claiming that it had uncovered evidence that Campbell's severe asthma and emphysema rendered him physically unable to have delivered the fatal blows, the state contended that Drake also participated in the murder of Eberhart. Testifying for the state, Campbell gave the same account of the events leading to the murder as he had related during his own trial. On the strength of this incriminating testimony, the jury convicted Drake and recommended that he be sentenced to death.

A few years after Drake's conviction, Campbell recanted his prior testimony and signed the aforementioned affidavit professing Drake's innocence in the crimes and admitting his own guilt. Drake now urges that this exonerating affidavit warrants habeas corpus relief. In evaluating this claim, the threshold question before us is whether the allegation of newly discovered evidence rises to a constitutional dimension cognizable in a federal habeas corpus action. We conclude that it does not.

[1, 2] The law is well settled that direct appeal is the primary vehicle for the review of state court convictions and "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, — US. —, —, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090, 1100 (1983). In order for a claim of newly discovered evidence to justify habeas review, the evidence must bear on the

constitutionality of the defendant's conviction. The Supreme Court in *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), expressly stated that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not ground for relief on federal habeas corpus." *Id.* at 317, 83 S.Ct. at 759, 9 L.Ed.2d at 788.

[3, 4] Although some circuits appear not to have followed *Townsend's* mandate, *see Grace v. Butterworth,* 586 F.2d 878, 880 (1st Cir. 1978); *United States ex. rel. Sostre v. Festa,* 513 F.2d 1313, 1317 (2d Cir.), *cert. denied,* 423 U.S. 841, 96 S.Ct. 72, 46 L.Ed.2d 60 (1975), the Fifth Circuit Court of Appeals clearly has adhered to its dictates. The court in *Shaver v. Ellis,* 255 F.2d 509 (5th Cir. 1958)[2] held that "[n]ewly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not its legality." *Id.* at 511. Thus, the role of habeas corpus is limited to consideration of challenges to the legality of a conviction; it may not be used to retry the defendant's innocence of guilt.[3] *Id. See also Anderson v.*

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2. In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

3. The appellant advances the argument that *Shaver* and its progeny are no longer valid law after *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). He insists that *Jackson* abrogated the bar against habeas corpus considerations of guilt or innocence. In actuality, there never was such a bar. Instead, there is a prohibition against consideration of evidence which bears solely on the defendant's guilt and

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Maggio, 555 F.2d 447 (5th. 1977) (habeas corpus relief based on a third party confession unwarranted even though no evidentiary hearing was held at either the state or federal level). Consequently, under *Townsend* and *Shaver*, the bare assertion of a third party confession is insufficient to warrant habeas relief.

II. Pursuit of Inconsistent Theories at Trial

[5] Drake contends that the prosecution pursued wholly inconsistent theories at each trial in order to procure death penalties for both defendants. He raises the novel claim that such a tack constitutes an "affront to the rudimentary demands of justice" in violation of his due process rights. Appellant's Brief at 41.

A review of the record reveals that the state's theories in the two trials were not totally inconsistent. At each

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not the constitutionality of a conviction. This requirement—that the new evidence relate to the constitutionality of the conviction—is part of the statute and remains in full force. 28 U.S.C. § 2254(a).

In comparing its decision with *Shaver*, the court in *Schneider v. Estelle*, 552 F.2d 593 (5th Cir.1977) provided a good example of when newly discovered evidence goes to the constitutionality of the conviction. In *Schneider*, if the newly discovered evidence had been proven to be true, then the appellant would have demonstrated knowing use of perjured testimony by the state, conduct which has long been held to violate due process. *See Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The *Schneider* court contrasted this result with *Shaver* in which the appellant alleged no constitutional defect but merely produced evidence of another individual's confession to the crime for which he was convicted. Thus, absent any errors of constitutional magnitude in the trial, the conviction would have to be upheld.

trial, the state clearly demonstrated its belief that both Drake and Campbell were involved in the murder-robbery. At Campbell's trial, the prosecutor alleged that Campbell actually perpetrated the murder while Drake played a lesser role. Conversely, during Drake's trial, the district attorney relied on Campbell's physical inability to commit the murder on his own to implicate Drake in the actual murder as well. Hence, the only inconsistent theory propounded in the two trials was that Campbell's prosecutor believed Campbell was the sole murderer while in Drake's case, the district attorney urged that, due to sheer physical necessity, Drake must have participated in the attack as well. Viewed in this light, the two theories are fairly consistent and there was no due process violation.[4]

III. Knowing Use of Perjured Testimony

[6] Although under *Townsend,* newly discovered evidence alone is insufficient to raise a constitutional claim, it is clear that a due process claim may arise when the evidence indicates a knowing use of perjured testimony by the prosecution. *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Skipper v. Wainwright,* 598 F.2d 425 (5th Cir.), *cert. denied,* 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979).

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4. Even had the two theories of prosecution been quite contrary, Drake's due process rights would not have been violated. Instead, if anyone was prejudiced by the prosecutorial inconsistency, it was Campbell. The evidence clearly demonstrated Campbell's severe physical limitations. Thus, as the state habeas judge correctly noted, "Campbell . . . and not [Drake] . . . has the superior right to complain about the tactics of the State because Mr. Campbell was convicted and sentenced to death by a prosecution that contended on another day that he was too old and sick and weak to commit the crime." Respondent's Exhibit No. 5 at 11.

Drake claims that because the state prosecuted Campbell in spite of his self-exonerating testimony, it obviously took the position that Campbell was guilty and that his accusation against Drake was false. Therefore, the use of testimony which the state previously propounded as untrue amounted to a knowing use of perjured testimony. This contention is without merit.

[7, 8] There is no proof that Campbell committed perjury in his original trial testimony. The mere fact that Campbell later contradicted his original account of the crimes is not an automatic indication that the previous testimony, twice given under oath, was false. The state trial judge at the hearing on Drake's extraordinary motion for new trial had the opportunity to hear Campbell's repudiation of his prior testimony. Drake's new trial motion was grounded exclusively in the allegation of newly discovered evidence. Therefore, although the state court order did not make a specific finding as to Campbell's credibilitly, its denial of a new trial implies that it did not believe his testimony. Where the court fails to make an express finding as to credibility but it is clear under the applicable law that the court otherwise would have granted the relief sought, then the failure to do so is "tantamount to an express finding against the credibility of the [witness]." *La Vallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973). Without establishing that Campbell's original testimony was untrue, Drake fails to make out a due process claim.

IV. Prosecutorial Misconduct

Capital murder trials are conducted under a bifurcated system in Georgia. If the defendant is convicted in

the guilt-innocence phase, then there is a separate sentencing trial in which the jury can impose either a life sentence or the death penalty. For certain purposes on appeal, the two phases can be considered separately. Drake alleges that his sentence of death "was imposed under the influence of prejudice, passion and other arbitrary factors as a result of improper remarks made by the prosecutor in his closing argument" in the presence of the jury. Appellant's Brief at 49.

In *Hance v. Zant*, 696 F.2d 940 (11th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), this court noted that "it is most important that the sentencing phase of the trial not be influenced by passion, prejudice or any other arbitrary factor." *Id.* at 951. Relying on *Hance*, Drake urges that he is entitled to a new sentencing hearing because the prosecutor's closing remarks unconstitutionally inflammed the passion and prejudices of the jury. In his summation, the district attorney read from the two Georgia cases, *Hawkins v. State*, 25 Ga. 207 (1857)[5] and *Eberhart v. State*, 47 Ga. 598 (1873)[6]

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5. The prosecution made the following reference to *Hawkins:*

> "If Your Honor please, in connection, in my urging you to submit this to the Jury, the State of Georgia, the Supreme Court of Georgia in *Hawkins versus the State* in 25 Georgia, p. 207, the Court, in upholding the murder and the death sentence in that case said this: 'Human life is sacrificed at this day throughout the land with more indifference than the life of a dog, especially if it be a good dog.' They went on to hold that Cain was the first murderer, but who is the last is known only to those who have read this morning's papers. And they said, 'If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness.' "

Record at 513.

6. Citing *Eberhart*, the prosecutor stated:

> "If your Honor please, in *Eberhart* versus the State, 47 Georgia, page 610, the Justice of the Supreme Court

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and then drew attention to Gary Gilmore, who was executed in 1977.[7]

Prior to the prosecutor's summation at Drake's trial, the court recognized him "for any remarks it wanted to make *to the Jury.*" Record at 511 (emphasis supplied). He then proceeded to make the same type of statements that the Georgia Supreme Court condemned previously in *Hawes v. State*, 240 Ga. 327, 240 S.Ed.2d 833 (1977)[8]

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> of Georgia said this, in connection with a death sentence for murder: 'We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at least about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminal warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society.' The Court went on to say, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society.' And if Your Honor please, the Court went on to hold, and in that case, that for criminals to go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which the bloody deed occurs. They said that a 'stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is the highest mark of civilization and it is also the surest mode to prevent the commission of offenses.' "
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> Record at 513-14.

7. The precise reference to Gilmore was: "And I submit, if your Honor please, that it [capital punishment] does deter. Gary Gilmore, if your Honor please, will never kill anyone else again." Record at 515.

8. In *Hawes*, the Supreme Court of Georgia criticized the same same argument made in Drake's trial, stating:

> The previously cited passage from *Eberhart*, supra, did not concern the facts of that case or the reasoning as ap-

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but with one distinction. Although the jury was present, the prosecution continually prefaced its remarks with the caption "if your Honor please." On direct appeal, the Georgia Supreme Court seized on these prefatory words to distinguish *Hawes* from *Drake*. The court stated that "the presence of the jury during such argument [does] not bring the argument within the scope of *Hawes*, though it would be preferable if such argument were conducted outside of the jury's presence." *Drake v. State*, 241 Ga. 583, 587, 247 S.E.2d 57, 60 (1978). Relying on this holding of the Georgia Supreme Court, the appellee argues that these remarks of the prosecutor were directed to the court and not to the jury. Therefore, they did not constitute error as a matter of state law.

[9, 10] In contrast to the Georgia Supreme Court's statement in *Drake*, the United States District Court for the Northern District of Georgia recently concluded that comments otherwise inflammatory when made in the presence of the jury are not spared constitutional infirmity by prefatory remarks indicating that they were directed solely to the court. *Potts v. Zant*, 575 F.Supp. 374 (N.D.-

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plied to those facts, but was mere obiter dicta. Therefore, no violation of Code Ann. § 24-3319 is apparent.

We do believe, however, that the remarks by the district attorney were improper. It would not have been improper for the district attorney merely to have expressed to the jury the sentiments embodied in the quote from *Eberhart*, supra. Cf. *Chenault* [v. *State*, 234 Ga. 216, 21[illegible] S.E.2d 223] supra. However, the district attorney's attribution of those sentiments to a justice of this court with the object of influencing the jury to impose the death penalty was improper and is disapproved.

Id. at 840.

Ga.1983). We agree with the district court. Where statements are so prejudicial that they would invalidate a sentencing hearing when made directly to a jury, they become no more constitutionally acceptable when uttered in the jury's presence but addressed to the judge regardless of whether they comport with state procedural rules. To hold otherwise would rely on technical form over substance and would ignore the fact that the intended audience was, in reality, the jury. Being bound by *Hance* and accepting the reasoning of *Hawes* and *Potts,* we hold the prosecutor's closing remarks during the sentencing hearing to have so inflamed the passions and prejudices of the jury that Drake's death penalty must be vacated and the cause remanded for resentencing.

V. Disproportionate and Excessive Punishment

Drake next maintains that the imposition of the death penalty is both disproportionate and excessive in violation of the eighth and fourteenth amendments, citing as authority *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Enmund,* the Supreme Court held that imposition of the death penalty for felony murder was unconstitutional where the record supported no more than the inference that the defendant was the driver of the getaway car. The court condoned imposition of a death sentence for felony murder only in cases in which the defendant killed, attempted to kill or intended to kill.

Drake argues that because the jury was instructed as to both felony murder and malice murder but returned only a general verdict of guilty, he cannot lawfully receive a death sentence under *Enmund* because the conviction

may have been based merely on the jury's belief that he was an accomplice to a felony murder.

The district court held *Enmund* to be inapposite because the record here supports the inference that Drake was the actual murderer and not simply an accomplice as in *Enmund*. We believe this interpretation of *Enmund* to be correct.

The crime of felony murder may be applied in two different situations. First, it may be used to impute the crime of murder to a participant in the felony who took no part in the actual murder. This type of felony murder will be referred to as accomplice culpability. Second, a participant in the commission of the felony who lacked the requisite intent to murder but did take part in the actual killing may be convicted of murder. In this case, the intent to commit the felony is imputed to the murder so that a showing of malice becomes unnecessary. Because we are dealing here with this latter type of felony murder, the *Enmund* decision is not controlling.

[11] *Enmund* disallows imposition of a death sentence on certain of those defendants convicted of murder under a pure accomplice involvement theory. Drake does not fall into that category. Instead, a review of the record reveals that the jury was presented with two conflicting stories at the trial: the state's position that Drake was the actual murderer, and Drake's protestations of pure innocence and ignorance of the crime until after the fact. No suggestion was made by either side nor could any inference be drawn from the record that Drake played any sort of minor accomplice role paralleling that in *Enmund*. The fact of Drake's conviction makes clear that the jurors

believed Drake to have participated actively in the charged crimes. Therefore, *Enmund's* prohibition against the death penalty for minor participation in the crime affords no relief for Drake.

VI. Burden-Shifting Jury Instructions

[12, 13] It is well-settled that in criminal prosecutions the state must prove every element of the crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Intent is an element of the crime of murder in Georgia. Ga.Code Ann. § 26-1101(a) (1983), *recodified as,* O.C.G.A. § 16-5-1(a), (b) (1982). At the close of the evidence and argument in Drake's original trial, the court's instructions to the jurors included the language that "a person of sound mind and discretion is persumed to intend the natural and probable consequences of his act. . . ." Record at 484. Drake contends that under *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), this charge unconstitutionally shifted the burden of proving intent from the state to him to prove the lack thereof.

The *Sandstrom* Court addressed the constitutionality of the charge, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." In assessing the validity of the questionable instructions, the Court stated that the proper test of constitutionality begins with a determination of how a reasonable jury might interpret the charge. In the case before it, the *Sandstrom* Court held that the challenged words standing alone might readily be understood to establish a conclusive presumption since there was no language indicating either that the presumption was rebuttable or that the inference was

anything but mandatory. Therefore, under *Sandstrom,* that charge, standing alone, would clearly result in unconstitutional burden shifting.

The law is also clear, however, that "a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 373 (1973). The focal consideration is "not merely that the instruction is undesirable, erroneous or even 'universally condemned' ", *Id.* at 146, 94 S.Ct. at 400, 38 L.Ed.2d at 373, but "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 147, 94 S.Ct. at 400, 38 L.Ed.2d at 374. *Accord Henderson v. Kibbe,* 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). With this principle in mind, we must evaluate the constitutionality of the challenged jury instruction in light of the entire charge.

The portions of the jury charge in this case pertinent to intent read as follows:

> The Defendant enters upon the trial of this case with the presumption of innocence in his favor, and that presumption remains with him throughout the trial until and unless the State carries the burden of proving the material allegations of this indictment beyond a reasonable doubt. Record at 480-81.
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> . . . . .
>
> Ladies and gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. I charge you that the acts of a person of sound mind and discretion are presumed to be the products of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, *but both of these presumptions may be rebutted.* I charge you, however, that *a person will not be presumed to act with*

> *criminal intent* but the trials (sic) of fact may find such intent from consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act to which the accused is here prosecuted. You are the triers of the facts; therefore, it is a question of fact solely for your determination as to whether or not there was a criminal intent on the part of the Defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now while a criminal intention may be proven in more than one way, the question of whether the Defendant did act with criminal intention is finally and always a question for you, the Jury, to determine. Record at 484-85. (Emphasis added).

The mandatory language of the charge in *Sandstrom* represents the unconstitutional end of the spectrum of potential jury instructions. At the other end, there is acceptable language like the charge upheld in *Hance v. Zant,* 696 F.2d 940, 946 (11th Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), that "intent . . . *may* be presumed," *id.* at 953 (emphasis original) which indicates clearly that the presumption is merely permissive. At first glance, it appears that the challenged language here, "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act," is more akin to that used in *Sandstrom.* Unlike in *Sandstrom,* however, the charge was not left standing alone but was surrounded by curative instructions. The question is then whether the charge at Drake's trial, when viewed in its entirety, has the same permissive effect as the charge in *Hance.*

[14] The Eleventh Circuit recently addressed the constitutionality of instructions virtually identical to those

given at Drake's trial in *Corn v. Zant*, 708 F.2d 549 (11th Cir.1983).[9] In *Corn*, we recognized that although the presumption was not phrased in the same permissive language as the charge in *Hance*, the instructions unequivocally state that the presumption is rebuttable and that individuals are presumed *not* to act with criminal intent. Due to this mitigating language, the *Corn* court concluded that the charge was "fair and balanced in both tone and ccntent, Whatever untoward effect any part of the instruction may have had was entirely vitiated by [both] the clear statement of the state's responsibility to prove intent beyond a reasonable doubt," *id.* at 560, and the numerous explicit references to the rebuttable nature of the presumtions. *Corn* binds squarely on this decision and thus Drake's contention that the instruction is burden shifting is without merit.

[15] We note further that a finding of intent does not play a crucial role in the outcome of this case. Because

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9. In *Corn*, the court gave the following instructions pertinent to intent:

> I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, *but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.* If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. *However, this presumption may be rebutted. A person will not be presumed to act with criminal intention,* but the trier of the facts, and that is you, the Jury, in this case, *may find such intention* upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted.

708 F.2d at 569 (emphasis original).

Drake was convicted both of armed robbery and murder, his murder conviction may be sustained even without a showing of intent to murder since, under the felony murder doctrine, that intent can be implied from the underlying felony. *See* Ga.Code Ann § 26-1101(b) (1983), *recodified as,* O.C.G.A. § 16-5-1(c) (1982). *Cf. Franklin v. Francis,* 720 F.2d 1206 (11th Cir.1983) (intent to murder the focal issue at trial). In fact, it is arguable that even if the instruction was improper, it was harmless error only. *See McGuinn v. Crist,* 657 F.2d 1107, 1108-09 (9th Cir.1981), *cert. denied,* 455 U.S. 990, 102 S.Ct. 1614, 71 L.Ed.2d 850 (1982) (*Sandstrom* error held harmless where intent not at issue). *Accord Lamb v. Jernigan,* 683 F.2d 1332, 1341 (11th Cir. 1982), *cert. denied,* — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983) (in certain circumstances a burden-shifting instruction on intent may be harmless error).

VII. Statutory Aggravating Circumstances

The eighth and fourteenth amendments prohibit the "standardless" imposition of the death penalty. *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Capital sentencing statutes must "provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not. *Id.* at 427, 100 S.Ct. at 1764, 64 L.Ed.2d at 406 *(quoting Furman v. Georgia,* 408 U.S. 238, 313, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346, 392 (1972) (White, J., concurring)). Under Georgia law, before the jury may inflict a death sentence, it must find the presence of at least one statutory aggravating circumstance.

At Drake's trial, the jury applied *inter alia,* statutory aggravating circumstance (b)(7), which provides that the

murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga.Code Ann. § 27-2534.1(b)(7) (1983), *recodified* as, O.C.G.A. § 17-10-30(b)(7) (1982). Because "[a] person of ordinary sensibility could fairly characterize almost any murder as 'outrageously . . . vile'", *Godfrey v. Georgia,* 446 U.S. at 428-29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406, the state courts must be vigilant in insuring that the broad language of subsection (b)(7) is narrowly applied.

Relying on *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), in which the Supreme Court overturned a death sentence, Drake claims that aggravating circumstance (b)(7) was unconstitutionally overbroad and vague as applied to his case. This reliance is misplaced. In *Godfrey,* the Supreme Court simply held the subsection to have been applied overbroadly after finding no support in the record for a conclusion that the murder in question was any more vile than any other homicide.

The fact situation in *Godfrey* is wholly different from the one in this case. There, the killing was instantaneous. Moreover, it was motivated by interfamilial emotional upset. Conversely, here the murder was motivated by greed. Additionally, the record indicates that Eberhart's death was anything but swift. To the contrary, it was the result of a massive bloody struggle. The victim was beaten so brutally that medical testimony disclosed "multiple places where the skull had been crushed and pushed into [the] brain." Record at 150. Photographs of the crime scene bear witness to the viciousness of the altercation that obviously took place.

[16] The *Godfrey* Court stated that the validity of a given death sentence turns on whether subsection (b)(7) was construed in a constitutional fashion. 446 U.S. at 432, 100 S.Ct at 1767, 64 L.Ed.2d at 409. After reviewing the record in this case and gleaning from it the hideous death inflicted by Drake, there can be no doubt that statutory aggravating circumstance (b)(7) was a proper consideration for the jury.[10]

VIII. Jury Instructions

[17] Finally, Drake asserts that the jury charge in the sentencing phase of the trial was not sufficiently clear to pass constitutional muster under *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir.), *cert. denied*, — U.S. ——, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). He claims that the charge, when viewed in its entirety, failed to make clear that the death penalty need not be imposed, even if a statutory aggravating circumstance were found by the jury.[11] Con-

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10. Even assuming improper application of the subsection, however, Drake's death sentence would be valid. The jury imposed the death sentence in reliance not only on (b) (7) but also on (b) (2), which provides that the murder "was committed while the offender was engaged in the commission of another capital felony," Ga. Code Ann. § 27-2534.1(b)(2) here, armed robbery.

    Recently, in *Zant v. Stephens*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), the Supreme Court held that the fact that a jury relied on one unconstitutional aggravating circumstance in its sentencing decision would not invalidate the death penalty as long as the jury also relied on a valid circumstance. Therefore, even had the jury arbitrarily considered (b) (7), Drake's death sentence would be upheld on this point.

11. The trial court's charge to the jury stated, in pertinent part:

    In regard to the offense of murder, in the event your verdict is life imprisonment, the form of your verdict would

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trary to Drake's allegation, the charge was phrased plainly and simply such that no reasonable jury could have been confused about the options available to it. The trial judge repeated not once, but twice, that imposition of the death penalty was not mandatory, even if aggravating circumstances were present.

Accordingly, the judgment of the district court is AFFIRMED in part, REVERSED in part and REMANDED for proceedings consistent with this opinion.

JOHNSON, Circuit Judge, dissenting:

I dissent from Section VI of the majority opinion in this case that deals with the *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), issue. Drake, as is usual when this issue is presented, argues that the trial court's jury instruction on the question of intent impermissibly shifted to him the burden of proof on that question. The majority rejects this argument as one "without merit" and, while not specifically stating so, seems to conclude that even if the instruction did unconstitutionally shift the burden of proof, it was harmless error because proof of intent was not essential to this case. The majority concludes that intent was not essential because Drake's

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be, "We, the Jury, recommend and fix the Defendant's punishment as follows: life imprisonment." If you find statutory aggravating circumstances beyond reasonable doubt, this should be set forth in your verdict. State what aggravating circumstances did exist; then you would add, "We, the Jury, recommend and fix the Defendant's punishment as death." *It is not mandatory that you impose the death penalty, even if you should find one or more of the aggravating circumstances do exist.* You can only impose the death penalty if you do find that one or more of the aggravating circumstances exist; but *it is not mandatory upon you to impose the death penalty.*

Record at 524-25 (emphasis added).

murder conviction might have been based on the felony murder doctrine rather than on a jury determination that Drake intentionally murdered his victim. The jury was instructed on felony murder as well as on malice murder, and it returned a general verdict. In my judgment, the majority on this issue is clearly wrong. Even if Drake's murder conviction was based on the felony murder doctrine, intent is an essential element of the underlying felony conviction, armed robbery. O.C.G.A. § 16-8-41.[1] Thus, an unconstitutional intent instruction affects a murder conviction based on the felony murder doctrine in the same manner that it affects a conviction for malice murder. Moreover, even though Drake's defense did not turn on the question of intent—he maintained an alibi defense—the state still carries the burden of proof beyond a reasonable doubt on every essential element of every charge brought against Drake, which on both the murder and armed robbery charges included the element of intent.

The challenged instruction in this case is nearly identical to the one held unconstitutional in *Franklin v. Francis*, 720 F.2d 1206 (11th Cir.1983), and to the ones held constitutional in *Tucker v. Francis*, 723 F.2d 1504 (11th Cir.1984), and in *Corn v. Zant*, 708 F.2d 549 (11th Cir.1983). The burden-shifting instruction in this case was as follows:

> The Defendant enters upon the trial of this case with the presumption of innocence in his favor, and that presumption remains with him throughout the

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1. O.C.G.A. § 16-8-41(a) provides: "A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon."

trial until and unless the State carries the burden of proving the material allegations of this indictment beyond a reasonable doubt. Record at 480-81.

. . . . .

Ladies and gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. I charge you that the acts of a person of sound mind and discretion are presumed to be the products of a person's will and a person of sound mind and discretior is presumed to intend the natural and probable consequences of his act, *but both of these presumptions may be rebutted.* I charge you, however, that *a person will not be presumed to act with criminal intent* but the trials (sic) of fact may find such intent from consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act to which the accused is here prosecuted. You are the triers of the facts; therefore, it is a question of fact solely for your determination as to whether or not there was a criminal intent on the part of the Defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now while a criminal intention may be proven in more than one way, the question of whether the Defendant did act with criminal intention is finally and always a question for you, the Jury, to determine. Record at 484-85. (Emphasis added).

In *Sandstrom,* the Supreme Court determined that, when applied to essential elements of criminal offenses, conclusive presumptions and mandatory rebuttable presumptions that a reasonable juror may interpret as requiring the defendant to present more than just some evidence to rebut, violate the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt. 442 U.S. at 519, 523-24, 99 S.Ct.

at 2458-59. Such presumptions violate the Constitution because they " 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime', and . . . 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Id.* at 523, 99 S.Ct. at 2459 (quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)). In a case in which intent was an element of the crime charged, the Court in *Sandstrom* rejected a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* 442 U.S. at 517, 99 S.Ct. at 2455. From this presumption, jurors reasonably could have concluded that they were to find against the defendant on the element of intent if they found proof of one element of the crime—causing death—even if insufficient proof were offered on other elements—the voluntariness and ordinary consequence of defendant's action. *Id.* at 523, 99 S.Ct. at 2459. Similarly, viewing the instruction as a mandatory rebuttable presumption, jurors reasonably could have concluded that "upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state." *Id.* at 524, 99 S.Ct. at 2459.

Moreover, *Sandstrom* concluded that the unconstitutional instruction was not cured by general instructions that the accused is presumed innocent until proven guilty and that the state has the burden of proving beyond a reasonable doubt every element of the offense charged. *Id.* at 518 n. 7, 99 S.Ct. at 2456, n. 7. These instructions were "not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two

sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Id.*

In *Franklin v. Francis, supra,* the Court rejected an instruction nearly identical to the one employed in this case that the majority opinion now approves. As in *Sandstrom,* the Court in *Franklin* found no cure in the trial court's additional jury charges that (1) criminal intent is not presumed and (2) the state bears the burden of proving beyond a reasonable doubt every element of the crime. 720 F.2d at 1211-12.

The majority opinion in this case virtually ignores *Franklin* and relies instead on *Corn v. Zant,* 708 F.2d 549 (11th Cir.1983), which is at least distinguishable and possibly wrong. *Corn* challenged an instruction nearly identical to the one the majority approves in this case. The panel in *Corn* approved the instruction because it "unequivocally stated" that it could be rebutted and because it contained a statement that a person is not presumed to act with criminal intent. Additionally, in *Corn* the trial court specifically stated that the prosecution bears the burden of proving intent beyond a reasonable doubt. These inconsistent instructions may have left the jury confused about where the burdens lay. As the court in *Franklin* noted, when inconsistency is apparent, it is impossible to tell which instruction the jury followed or whether they applied something in between. 720 F.2d at 1212.

Even if *Corn* is not wrong, it is distinguishable. Unlike the case now before this panel, the trial judge in *Corn,* after giving the objectionable instruction, gave an instruction specifically identifying the burdens on the element of intent. The trial court said:

> I charge you that intention is an essential element of any crime and that the burden is on the State to prove intention beyond a reasonable doubt. While the burden is not on the Defendant to disprove intention, nonetheless, if he produces some competent evidence of insanity, . . . then the burden falls upon the State to prove beyond a reasonable doubt that the Defendant was sane at the time of the alleged crime. . . .

708 F.2d at 569-70 app.

This *may* satisfy the requirement discussed in *Franklin* that the instruction explain by what quantum of evidence the defendant must rebut any presumption established by the instruction, 720 F.2d at 1212, because it specifically states the extent of the prosecution's burden on intent. Assuming that a subsequent instruction can cure the error of the earlier challenged instruction, the assumption is irrelevant in Drake's case because it appears that no such curative instruction was given to Drake's jury. Thus, in the case now before us, the majority approves the instruction simply because the presumption that it establishes is rebuttable and because it states that criminal intent cannot be presumed. The rebuttable nature of the presumption is not enough to save it. *Sandstrom* itself refutes such an argument. The Court in *Sandstrom* specifically rejected mandatory rebuttable presumptions that require the defendant to do anything more than just *produce* "some" evidence in rebuttal. *Sandstrom, supra,* 442 U.S. at 517, 99 S.Ct. at 2455-56. It is not enough that the presumption is rebuttable; the critical question is whether the jury was made aware that the burden on the defendant, if it must be articulated that way, is a very low production burden and not a burden of persuasion. In the case now before us this was not specifically pointed out to the jury.

I dissent.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the applications for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX C

Henry Arthur DRAKE,
Petitioner-Appellant,

v.

Ralph KEMP, Warden,
Respondent-Appellee.

No. 83-8047.

United States Court of Appeals,
Eleventh Circuit.

May 31, 1985.

Defendant, who had been convicted in state court of murder and armed robbery, after unsuccessful appeal and state habeas proceedings, sought federal habeas corpus relief. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, denied petition, and defendant appealed. A panel of the Court of Appeals, 727 F.2d 990, affirmed in part and reversed in part. On rehearing en banc, the Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) trial court's instructions to jury in sentencing phase of capital murder prosecution made clear that death penalty need not be imposed; (2) instruction which impermissibly shifted burden of proving intent to defendant was reversible error; and (3) prosecutor's closing argument in sentencing phase, in which prosecutor cited two state Supreme Court decisions which were over 100 years old to urge jury not to consider mercy in imposing sentence, rendered sentencing hearing fundamentally unfair.

Affirmed in part, reversed in part, and remanded.

James C. Hill, Johnson and Clark, Circuit Judges, specifically concurred and filed opinions.

Kravitch, Circuit Judge, concurred and filed opinion.

Mary J. Wilkes, Atlanta, Ga., for petitioner-appellant.

Susan V. Boleyn, Asst. Atty. Gen., Paula K. Smith, Staff Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON, and CLARK, Circuit Judges.*

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* All of the Judges of the Court, except Judge Clark, join in the disposition of the six issues referred to in the Introduction to Judge Anderson's opinion for the Court, reinstating the panel opinion with respect to one issue and declining to reach the other five issues. Judge Clark's specially concurring opinion discusses the additional grounds upon which he would also rest in granting the writ of habeas corpus.

All of the Judges of the Court join in Part I of Section One of Judge Anderson's opinion concluding that there was a *Sandstrom* violation. Judge Hill has also written separately on this issue.

The following Judges join in Part II of Section One of Judge Anderson's opinion concluding that the *Sandstrom* error was not harmless: Godbold, Chief Judge, and Judges Roney, Tjoflat, Fay, Vance, Kravitch, Henderson, Hatchett, Anderson and Clark. Judges Hill and Johnson have each filed an opinion separately concurring in this result.

The following Judges join in Section Two of Judge Anderson's opinion concluding that the prosecutorial argument did render the sentencing phase fundamentally unfair: Godbold, Chief Judge, and Judges Roney, Tjoflat, Hill, Fay, Vance, Henderson, Hatchett, and Anderson. Judge Hill has also written separately on this issue. Judges Kravitch and Clark have each filed opinions separately concurring in the result only. Judge Johnson, without opinion, also concurs in the result only.

R. LANIER ANDERSON, III, Circuit Judge:

INTRODUCTION

This case was taken en banc principally to consider two of the several constitutional claims asserted by appellant Henry Drake. In Section One of this opinion, we discuss the claim that the instruction on intent at Drake's trial improperly shifted the burden of proof in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). We conclude that there was a *Sandstrom* violation, and that the error was not harmless beyond a reasonable doubt. In Section Two of this opinion, we discuss Drake's claim that the prosecutor's argument during the sentencing phase of his capital trial rendered the sentencing phase fundamentally unfair. We conclude that the prosecutor's argument did render the sentencing phase of the trial fundamentally unfair.

[1] In addition to the two issues which this opinion will discuss, Drake asserted six other constitutional claims: (1) that new evidence based on the recantation of a key witness against Drake warranted habeas corpus relief; (2) that the use of inconsistent theories in prosecuting Drake and a defendant allegedly involved in the same crimes violated due process; (3) that the prosecution's knowing use of perjured testimony violated due process; (4) that the aggravating circumstances—the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga.Code Ann. § 17-10-30(b)(7)—was unconstitutionally overbroad and vague as applied to Drake's case, in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); (5)

that the instructions during the sentencing phase of Drake's trial failed to inform the jury that it need not impose the death penalty even if a statutory aggravating circumstance had been found beyond a reasonable doubt; and (6) that Drake's sentence of death was disproportionate under *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The panel affirmed the district court's denial of relief on each of these six issues. *Drake v. Francis,* 727 F.2d 990 (11th Cir.), *vacated for reh'g en banc,* 727 F.2d 990, 1003 (11th Cir.1984). With respect to issue (5) above, Drake's challenge to the trial court's sentencing instructions, we reinstate Part VIII of the panel opinion. *See Drake v. Francis,* 727 F.2d at 1000. We decline to reach issues (1), (2), (3), (4), and (6), exercising our discretion not to do so in light of our resolution of the case granting relief on other grounds.

C.E. Eberhart was savagely beaten and stabbed on December 5, 1975, as he worked in his barber shop in Colbert, Georgia. He died a few months later from head wounds without regaining consciousness. A bloody hammer and pocket knife were found on the premises.

Investigation of the crime soon focused on William Campbell and Henry Drake. The two men, along with a woman, had been in Colbert the day of the attack and Campbell was was seen lounging near the barber shop. A search of the house where Drake, Campbell, and the woman lived uncovered a Timex watch belonging to Eberhart in a drawer containing Campbell's clothes. Campbell and Drake were tried in separate trials. Campbell was tried first for murder and armed robbery. At trial, he claimed to have been sitting in the barber shop when Drake entered and attacked Eberhart. Campbell was convicted and sentenced to death.

At Drake's trial, the state proceeded on the theory that Campbell could not have committed the murder by himself. The victim, although elderly, was strong, while Campbell was weakened by asthma and emphysema. Campbell was the principal state witness linking Drake to the murder; he repeated the story he gave at his own trial. Drake testified and explained that, on the day of the attack, he had dropped Campbell off at the barber shop and then visited relatives in Colbert. He later returned to pick up Campbell and they drove to Madison, Georgia. This story was corroborated by family members who testified at trial. At the close of the evidence, and after a long deliberation, Drake was convicted of murder and armed robbery.

Drake was sentenced to death on the murder charge and to life imprisonment on the armed robbery charge. His convictions and sentences were affirmed on direct appeal by the Georgia Supreme Court. *Drake v. State,* 241 Ga. 583, 247 S.E.2d 57 (1978). Drake then petitioned the United States Supreme Court for a writ of certiorari which was denied. *Drake v. Georgia,* 440 U.S. 928, 99 S.Ct. 1265, 59 L.Ed.2d 485 (1979). Subsequently, in July 1979, Drake filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. After a hearing on the merits, the court denied relief. The Georgia Supreme Court and the United States Supreme Court both declined to review the denial of the state habeas petition.

Two years later, Drake filed an extraordinary motion for a new trial in the Madison County Superior Court alleging the discovery of new evidence that would prove his innocence. The new evidence was in the form

of an affidavit by William Campbell, the prosecution's star witness against Drake, repudiating his previous testimony inculpating Drake. After a hearing, during which Campbell testified substantially to the same facts contained in his affidavit, the trial court denied the motion and the Georgia Supreme Court affirmed. *Drake v. State,* 248 Ga. 891, 287 S.E.2d 180 (1982). The Supreme Court again denied certiorari. *Drake v. Georgia,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1322 (1982).

In August 1982, Drake filed the instant petition for habeas corpus relief in the United States District Court for the Middle District of Georgia. The district court denied relief. On appeal, a panel of this court granted relief only on the issue involving the prosecutor's argument during the sentencing phase. *Drake v. Francis,* 727 F.2d 990 (11th Cir.1984). A petition for rehearing en banc was granted, thus vacating the panel opinion. 727 F.2d 1003 (11th Cir.1984).

SECTION ONE: *SANDSTROM ISSUE*

I. WAS THERE AN IMPERMISSIBLY BURDEN-SHIFTING INSTRUCTION UNDER *SANDSTROM*?[1]

[2] Drake was charged with and convicted of armed robbery and mruder. Drake argues that the trial judge's instruction regarding intent was impermissibly burden-

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1. Although defense counsel made no objection to the jury charge at trial, there is no procedural default because the state habeas court reached the *Sandstrom* issue on the merits, *Drake v. Zant,* No. 4246, slip op. at 9 (Sup.Ct. Butts Cty. Dec. 14, 1979), and the state has not claimed procedural default in this court or the district court; nor has it argued that defense counsel's failure to object should otherwise affect the *Sandstrom* analysis.

shifting under *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The relevant part of the instruction reads as follows:

> Ladies and gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. *I charge you that the acts of a person of sound mind and discretion are presumed to be the products of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but both of these presumptions may be rebutted.* I charge you, however, that a person will not be presumed to act with criminal intent but the trials [sic] of fact may find such intent from consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act to which the accused is here prosecuted. You are the triers of the facts; therefore, it is a question of fact solely for your determination as to whether or not there was a criminal intent on the part of the Defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now, while a criminal intention may be proven in more than one way, the question of whether the Defendant did act with criminal intention is finally and always a question for you, the Jury, to determine.

(Emphasis added).[2] The above emphasized instruction, which amounts to a mandatory rebuttable presumption on the essential element of intent, is virtually identical to the ones found impermissible in the recent Supreme Court case of *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), and in our recent en banc case of *Davis v. Kemp,* 752 F.2d 1515, 1517-19 (11th Cir.1985)

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2. The entire jury charge is reproduced as Appendix "A" to this opinion.

(en banc). The state argues, however, that the trial court's general instruction regarding the state's burden of proof with respect to every element of the crimes charged and the instruction stating that "a person will not be presumed to act with criminal intent . . .", was curative of any potentially burden-shifting instruction. *See Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973) jury charge must be read as a whole). This contention must fail in light of *Francis v. Franklin* which considered substantially identical allegedly curative instructions and nevertheless held the instruction as to intent to be impermissibly burden-shifting. *See Franklin,* — U.S. at —, 105 S.Ct. at 1974-1976; *accord, Davis,* 752 F.2d at 1517-19.

After a careful review of the entire jury charge, and employing the analysis set forth by the Supreme Court in *Francis v. Franklin,* we find that a reasonable juror could well have concluded that Drake bore the burden of proof on the necessary element of intent. The relevant portions of the jury instructions cannot be distinguished from the jury charge in *Francis v. Franklin,* which we find to be controlling. We thus conclude that the instruction violates *Sandstrom.*

II. WAS THE *SANDSTROM* ERROR HARMLESS?

[3] The Supreme Court has expressly left open the question whether a *Sandstrom* error can ever be harmless. *Francis v. Franklin,* — U.S. at —, 105 S.Ct. at 1977. However, our en banc court in *Davis* recently reaffirmed for this circuit that a *Sandstrom* error, like most other errors of constitutional magnitude, can be held harmless beyond a reasonable doubt. *Davis v. Kemp,* 752 F.2d at 1520-21; *see also McCleskey v. Kemp,* 753 F.2d 877, 902-03 (11th

Cir.1985) (en banc). *Davis* identified two situations where harmless error analysis would be appropriate: (1) where the evidence of the defendant's guilt was overwhelming; and (2) where the instruction concerned an element of the crime which was not put in issue at trial. *Davis,* 752 F.2d at 1521 (citing *Lamb v. Jernigan,* 683 F.2d 1332, 1342 11th Cir. 1982), *cert. denied,* 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983)). *Davis* clarified the first prong by recognizing that the analysis should usually focus on whether the evidence of *intent,* rather than the more inclusive of *guilt,* is overwhelming. *Davis,* 752 F.2d at 1521 & n. 10; *see Connecticut v. Johnson,* 460 U.S. 73, 86, 103 S.Ct. 969, 977, 74 L.Ed.2d 823 (1983) (plurality opinion); *id.* at 90, 96, 97, 99, 101, 103 S.Ct. at 979, 982, 983, 984, 985 (Powell, J., dissenting); *accord, Franklin v. Francis,* 720 F.2d 1206 ,1212 (11th Cir.1983), *aff'd,* — U.S. —, at —, 105 S.Ct. 1965, at 1977 (1985) (affirming this "court's conclusion that the evidence of intent was far from overwhelming . . ."). Thus, in many cases, a *Sandstrom* error as to intent can be found harmless where the evidence of intent is overwhelming, even where there is conflicting evidence as to whether the defendant was the killer. *Davis,* 752 F.2d at 1521; *see also Brooks v. Kemp,* 762 F.2d 1383, 1390 (11th Cir.1985) (en banc). This is so because the erroneous intent instruction usually could affect only the jury's determination of intent, and could not possibly affect the jury's determination of who the killer was.[3] We

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3. A further refinement of the intent concept is appropriate. The particular instruction here that is erroneous is the mandate that the jury presume that the defendant intended the natural and probable consequences of his acts. The jury was expressly and properly charged that "criminal intent" was not

(Continued on following page)

turn, then, to the evidence of the perpetrator's intent to commit the crimes for which he was charged and convicted, to determine whether the evidence of intent was overwhelming.

[4] The uncontradicted evidence indicates that the perpetrator struck the victim repeatedly in the head with a blunt instrument. The evidence also indicates that the victim was stabbed with a knife by the perpetrator. A bloody knife and hammer were found at the barber shop where the victim was killed. Numerous witnesses testified to the effect that there was blood all over the floor and the walls of the barber shop when they arrived at the scene after the attack. In addition, photographs were put in evidence corroborating this testimony. There were also considerable evidence concerning the extent of the damage done to the victim's head. Several witnesses testified that the victim was barely recognizable. Another testified that the blunt instrument was applied with such apparent force and repetition that a hole the size of one's hand had been gouged out of the victim's head.

Drake testified at trial and presented an alibi defense. Drake's testimony is summarized as follows: He and a friend, Mary Carruth, dropped William Campbell off at the barber shop in Colbert, Georgia, so that Campbell could get a haircut. Drake and Carruth then drove to

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(Continued from previous page)

to be presumed. The erroneous instruction here relates to subsidiary elements of "criminal intent," i.e., intent with respect to natural and probable consequences. Hereafter, when we refer to intent, we are referring to this latter meaning, and our concern will be to determine whether there is overwhelming evidence that Drake intended the natural and probable consequences of his acts.

Drake's mother's house a few miles out of town for supper. Later, not knowing that Campbell had murdered and robbed the barber, Drake and Carruth returned to Colbert and picked up Campbell in front of a laundromat, located across the street from the barber shop. Drake, Carruth, and Campbell then returned to their home in Madison, Georgia, where they spent the night. The next morning Campbell threateningly urged Drake to take him to Atlanta. Drake drove Campbell to Atlanta and dropped him off there.

Campbell was later found in Norton, Virginia. Carruth substantially corroborated Drake's testimony, although there were some discrepancies. For instance, she testified that Campbell explicitly told Drake on the night of the crimes that he [Campbell] had killed the barber, a fact which is noticeably absent from Drake's testimony. She also claimed that Campbell pulled a gun on Drake and forced him to drive to Atlanta. There was also corroborating testimony from several of Drake's relatives that Drake was present at his mother's house during the time the crimes were perpetrated. In addition, defense counsel, through cross-examination of the state's witnesses, further attempted to suggest that Campbell, not Drake, was the sole perpetrator. Finally, in closing, defense counsel argued that Campbell was the sole perpetrator, and that there was no testimony inculpating Drake other than Campbell's self-serving testimony, while physical evidence —blood samples taken from the barbershop door and from the handle of the hammer—pointed to Campbell's involvement.

The state's theory — despite Campbell's testimony as a prosecution witness that he was simply having his hair

cut when Drake came in and robbed and murdered the barber — was that both Drake and Campbell committed the crimes. The prosecutor argued in closing that Campbell, since he was severely asthmatic, could not physically have murdered the barber without some assistance from Drake. Thus, as discussed more fully below, the state asserted a theory of accomplice liability.

The above discussion indicates that there was considerable controversy over who was the perpetrator of the crimes. Surely, the evidence implicating Drake as the killer is not overwhelming.

However, *Davis* and *Brooks* make it clear that in many cases an erroneous intent instruction could not possibly have affected the jury's determination of who the killer was, and thus if the evidence of the perpetrator's intent is overwhelming the erroneous intent instruction may be harmless. *Brooks v. Kemp,* 762 F.2d 1383, 1390 n. 9; *Davis,* 752 F.2d at 1521 & n. 10. If malice murder were the only theory asserted by the state, or the only theory submitted to the jury, we would conclude that the erroneous intent instruction was harmless on these facts. Under the malice murder theory, the only issue for the jury would have been whether Drake was present in the barber shop, as Campbell testified, or elsewhere, as Drake testified, and the questioned instruction could have had no bearing on this issue. Rather, the instruction would only have been relevant to the issue of whether the perpetrator of the murder intended death to result as the natural or probable consequence of the blows to the head. However, the unrebutted evidence here was that the blows were administered with extreme force and repetition, and

this could not have been the result of accident or other nonintentional conduct. Therefore, there was overwhelming evidence that the perpetrator intended to kill. *See Richard Tucker v. Kemp,* 762 F.2d 1496 (11th Cir. 1985) (en banc) (unrebutted evidence of crushing, fatal blow to victim's skull with metal pole negated possibility that killing was accidental or otherwise unintentional). However, malice murder was not the only theory submitted to the jury. A prominent part of the prosecutor's case was the theory of accomplice liability.

Drake argues that there is no way to determine whether the jury found that Drake was the actual killer and/or armed robber. The evidence before the jury implicitly raised the issue of Drake's liability as an accomplice to the robbery and murder. The state indicted Drake on three theories of murder: malice murder, felony murder, and aiding and abetting a murder, each of which could independently support a conviction for murder under Georgia law. The last two theories, felony murder and aiding and abetting a murder, do not require a finding that the defendant killed or even intended to kill. With respect to felony murder, guilt as to murder is imputed from a finding that the defendant himself killed the victim while intentionally committing another felony; or guilt as to murder could be imputed from a finding that a co-participant killed the victim while the defendant and the co-participant were engaged in the commission of another felony.[4] With respect to aiding and abetting a murder,

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4. Drake contends that his accomplice liability argument applies to both the felony murder and aiding and abetting theories. Because of our disposition with regard to the aiding and abetting theory, we need not reach the felony murder theory.

guilt as to murder is imputed if the defendant "intentionally aids or abets in the commission of the crime." Jury Instructions, Trial Transcript at 490-91. The judge instructed the jury on all three theories and the jury returned only a general verdict of guilty.[5]

If the jury found Drake guilty only on a theory of accomplice liability, then it is clear that the state's burden in the *Sandstrom* context would be to prove *both* that the actual killer, presumably Campbell, intended to kill, *and* that Drake intended to aid and abet the crimes. Because of the forceful and repeated blows dealt by the perpetrator, *see* discussion in text *supra,* we assume that the actual killer intended to kill. The crucial question then becomes whether the erroneous intent instruction affected the jury's determination of whether Drake intended to aid and abet the crimes.

Drake argues that the evidence implicitly raised the issue of Drake's liability as an accomplice, that the accomplice theory was a prominent part of the state's case, and that this theory was submitted to the jury. The state's theory of the case was that both Drake and Campbell were present in the barber shop and participated in the beating and killing. The jury might well have concluded that Campbell was the prime mover in both the murder and

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5. Similarly, with respect to the armed robbery charge, upon which the jury also returned a general verdict, the trial court's instructions permitted the jury to convict on two theories of armed robbery. The jury might have found Drake guilty of the actual robbery. However, the jury was also allowed to impute guilt as to armed robbery by finding, pursuant to the trial court's aiding and abetting instruction, that Drake aided and abetted Campbell's armed robbery.

the armed robbery, and that Drake merely assisted (*i.e.*, aided and abetted).[6] The prosecutor argued to the jury:

> [The law of conspiracy] means that any time two or more people get together, they don't even have to speak; if the thought crosses their mind and each knows what the other is doing and they go and do that unlawful act. Not only that but if a person commits a crime and is in the process of committing it and concealing it, and another party joins in and helps and aids and abets in the commission of that crime, they have joined into that conspiracy themselves. And under the law, they are responsible from the beginning to the end. It is a good law. It is designed to punish everyone who is involved in the commission of that crime. The Court will charge you what a party to a crime is; and that is *anyone that is either directly or indirectly involved in it or aids and abets or does anything to conceal it or get another person away from there;* not [my] law . . . the law all over the state of Georgia and [it] applies to each and every citizen.

Trial Transcript at 470 (emphasis added); *see also* Trial Transcript at 441-43 (prosecutor opened his closing argument by reading the Georgia statute relating to accomplice liability, and quoting from a Georgia case to the effect that a co-conspirator who remains in the get-away

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6. If the jury convicted on the basis of this accomplice theory (under which Drake did not himself administer the blows to the victim), the jury would have to have inferred that Drake intended to aid or abet from his mere presence in the barber shop or from some act of assistance (short of himself administering the blows) which had the natural or probable consequence of furthering the crime. The erroneous jury instruction shifted the burden of proof in the inference process.

car while others rob a store is liable for the killing of the merchant).[7]

The aiding and abetting theory was prominent throughout the trial: implicitly in the testimony of Drake and Carruth, and explicitly in the opening statements of both sides, in the prosecutor's initial and closing summations to the jury, in defense counsel's closing argument, and in the trial court's charge to the jury.[8] Thus, the choice to convict Drake of armed robbery and murder solely on the basis of Drake's aiding and abetting the crimes committed by Campbell was squarely before the jury.

Since aiding and abetting must be intentional, and since that intent element could have been affected by the erroneous burden-shifting instruction on intent, the issue before us becomes whether there is overwhelming evidence that Drake *intended* to aid and abet the crimes. The only evidence on this issue came from Campbell, which falls far short of constituting overwhelming evidence.

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7. Also, Drake suggests another scenario of accomplice liability as follows. Drake contends that the inconsistencies and incredibility of Campbell's testimony might have led the jury to reject much of Campbell's testimony, and to accept much of Drake's testimony that he merely dropped Campbell off and later picked him up and then later still took him to Atlanta. Nonetheless, Drake theorizes, the jury may have rejected Drake's disclaimer of knowledge of Campbell's plan to rob or harm the barber. Thus, he argues, the jury might have found that Drake aided and abetted the crimes by delivering Campbell to the scene of the crimes, picking him up, and helping him escape to Atlanta.

8. In another context, the district court found that "in Campbell's trial, the State's theory was that Drake was probably just the 'pick-up man.'" *Drake v. Francis*, No. 82-99-ATH, slip op. at 8 n. 4 (M.D.Ga. Dec. 15, 1982).

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), sets out the standard by which most constitutional errors should be considered harmless. Under *Chapman*, a criminal conviction must be reversed if the appellate court cannot say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. The problem here is that the erroneous instruction shifted the burden to Drake to disprove intent, an essential element of the crime of aiding and abetting. This the state may not do. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (state has burden of proving every element of the crime charged beyond a reasonable doubt). Since this intent element was at issue in the case, and since there was not overwhelming evidence that Drake intended to aid and abet the crimes, we conclude that the error was not harmless beyond a reasonable doubt.

Accordingly, we conclude that Drake is entitled to relief on his *Sandstrom* claim with respect to both the armed robbery and the murder convictions.

SECTION TWO: PROSECUTORIAL ARGUMENT[9]

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9. We might have declined to address Drake's prosecutorial argument claim, since our decision on the *Sandstrom* issue will require a new trial on malice murder and armed robbery and, thus, a new sentencing hearing if Drake is found guilty on the murder charge. However, for the same reasons that it is desirable in many cases for district courts to address alternatively the several claims in capital cases, we exercise our discretion to proceed in this case, in the mode of an alternative holding, to address the issue of prosecutorial argument at sentencing.

Part I of this section of the opinion will discuss the facts relevant to Drake's challenge to the prosecutorial argument at the sentencing phase. Part II sets forth the standard of review adopted by this court in *Brooks v. Kemp,* 762 F.2d 1383 (11th Cir. 1985) (en banc). Part III will examine arguments made by the prosecutor in this case to determine their propriety. Finally, Part IV will consider whether the improper arguments rendered Drake's capital sentencing hearing "fundamentally unfair." *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

I. FACTS

Following Drake's conviction, the trial court commenced the sentencing phase of the capital trial. Under Georgia law, the hearing is designed to bring out evidence relevant to sentencing and provide the jury with the guidance constitutionally required for imposition of the death penalty. *See Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Ga.Code Ann. § 17-10-2(c). Most capital sentencing hearings consist of additional evidence put on by the state and the defendant and closing arguments of counsel.

The state began by introducing evidence of Drake's previous criminal record. Drake had been convicted of the offenses of burglary, abandoning minor children, and obtaining money by a false writing. This was the sole evidence introduced in aggravation of sentence other than the evidence of the crime itself.

Drake then took the stand. He stated that he was sorry for the victim, but reiterated that was not the murderer. This was the only evidence put forth in mitigation.

Each attorney then delivered a closing argument to the jury.[10] Following instructions on the issue of sentence, the jury retired for its deliberation. It returned a verdict of death on the murder count.[11]

II. STANDARD OF REVIEW

[5] In *Brooks v. Kemp,* 762 F.2d at 1397 (11th Cir.1984) (en banc), this court considered the standard for federal habeas corpus review of prosecutorial closing arguments. Improper argument will only warrant relief if it renders a petitioner's trial or sentencing "fundamentally untair." 762F.2d at 1399-1400 (citing *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). That determination dependes on whether there is a reasonable probability that, in the absense of the improper arguments, the outcome would have been different. 762 F.2d at 1401-1402 (citing *Strickland v. Washington,* — US. —, —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1974)). A "reasonable probability" is

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10. The prosecutor, Bryant Huff, gave a closing argument that filled 8 transcript pages; the alleged improprieties in the argument will be addressed in Part III of this opinion.

11. Pursuant to Georgia law, the jury is required to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to support the finding of death. If no aggravating circumstance is found, death may not be imposed. If an aggravating circumstance does exist, the jury may exercise its discretion in choosing between life imprisonment and death as the appropriate punishment. *See Zant v. Stephens,* 250 Ga. 97, 297 S.E.2d 1 (1982). In this case, the jury found two aggravating circumstances to support death for the murder—(1) that the murder was committed in the course of another capital felony (armed robbery), and (2) that the offense was "outrageously and wantonly vile, horrible and inhuman." *See* Ga.Code Ann. §§ 17-10-30(b) (2) and (b) (7).

a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2069, 80 L.Ed.2d at 698.

Our review must first examine the argument itself to see if improper arguments were made. Because we do find an improper prosecutorial argument, we will then consider whether there is a reasonable probability that the outcome of Drake's sentencing hearing would have been different had the argument not been made.

III. PROPRIETY OF PROSECUTORIAL ARGUMENT

[6] Drake claims that argument made by prosecutor Bryant Huff during his capital sentencing hearing was impermissible. A Georgia prosecutor may argue subjects relevant to the capital sentencing jury's decision. Those subjects generally include the facts of the crime, individual characteristics of the defendant (including future dangerousness and rehabilitative prospect), and the valid penological justifications for the punishment (retribution, incapacitation, and general deterrence). *Brooks v. Kemp,* 762 F.2d at 1405-1408. We will now examine the arguments complained of by Drake to see if they exceeded those legitimate sentencing considerations.

1. Huff argued to the jury by reading quotes from two opinions of the Georgia Supreme Court.

> If your Honor please, in connection, in my urging you to submit this to the jury, the State of Georgia, the Supreme Court of Georgia in *Hawkins v. State,* in 25 Ga., page 207, the Court, in upholding the murder and the death sentence in that case said this:

> "Human life is sacrificed at this day throughout the land with more indifference than the life of a dog, especially if it be a good dog." They went on to hold that Cain was the first murderer, but who was the last is known only to those who have read this morning's papers. And they said, "If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness."
>
> If your Honor please, in *Eberhart v. State,* 47 Ga. [598], page 610, the Justice of the Supreme Court of Georgia said this, in connection with the death sentence for murder: We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at least about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society." The Court went on to say, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist on mercy to society." And if your Honor please, the Court went on to hold, and in that case, that for criminals to go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which the bloody deed occurs. They said that a "stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is the highest mark of civilization, and it is also the surest mode to prevent the commission of offenses."

Drake claims this tactic was extremely improper. We agree.

[7] Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury.

For this reason, misconduct by the prosecutor, normally an elected public official, must be scrutinized carefully. *Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). In *Brooks v. Kemp,* we considered an argument that stressed the prosecutor's infrequency of seeking the death penalty in order to suggest that the defendant was particularly deserving of death. 762 F.2d at 1410-1411. That argument invited the jury to rely on the expertise of the prosecutor instead of exercising fully its own discretion to choose punishment. We held that argument to be improper. *See also Richard Tucker v. Kemp,* 762 F.2d 1496, 1505 (11th Cir.1985) (en banc); *Wm. Boyd Tucker v. Kemp,* 762 F.2d 1480, 1484 (11th Cir.19385) (en banc).

[8, 9] If invoking the expertise of the prosecutor is dangerous, the invocation of the Supreme Court of Georgia to abjure mercy is undeniably wrong. *Hawes v. State,* 240 Ga. 327, 240 S.E.2d 833, 840 (1977) Huff, not surprisingly, failed to mention that the cases quoted were each over 100 years old. Needless to say, each pre-dated the contemporary judicial effort to guide capital sentencing by principles drawn from the Eighth Amendment's protection againsta cruel and unusual punishment. In the current Georgia capital punishment regime, the sentencing jury has complete discretion to choose between life imprisonment or death after the finding of no statutory aggravating circumstance. *Zant v. Stephens,* 250 Ga. 97, 297 S.E.2d 1 (1982). Mercy may be a part of that discretion. Attributing the contrary view to the state's highest court was misleading and prejudicial. We will further

consider the effect of this argument in Part IV of this section.[12]

2. Huff spoke of deterrence, expressing his belief that, although it could never be proven, the death penalty did deter crime:

> If your Honor please, there are those who do not believe in capital punishment. They say that is not a deterrent. If your Honor please, I submit to the Court, deterrence can never be proven. I submit to the Court, the capital punishment law does deter. The capital punishment law is like the light house that stands by the sea that casts it [sic] light out on the treacherous course for the ships to pass safely through. Oh yes, if your Honor please, we can't count all the ships that that light passed its way and directs its course and makes it safely through, but it's easy to count the ships that wreck on shore that do not heed that guiding light. And I submit, if your Honor please, that it does deter.

Drake criticizes this comment as an unreliable personal opinion.

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12. Although the Georgia Supreme Court explicitly disapproved of this same prosecutorial argument in *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977), it rejected Drake's assertion of error on the technical ground that the prosecutor continually said "if your Honor please" during his argument, and thereby addressed the argument to the court and not the jury. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57, 60 (1978). This distinction is unpersuasive and does not cure the recognized impropriety of remarks. *Drake v. Francis*, 727 F.2d 990, 996 (11th Cir.1984) (panel opinion) (accepting state's distinction would "rely on technical form over substance and would ignore the fact that the intended audience was, in fact, the jury"); *see also Potts v. Zant*, 734 F.1d 526, 535-37 ((11th Cir.1984) (same). In fact, the *Drake* argument was worse than that in *Hawes*, where the prosecutor at least informed the jury that the cases quoted were over 100 years old. In *Drake*, Huff made no such remark and the clear implication of his quotation was that "this *is* the view of the Georgia Supreme Court."

[10-12] An attorney's personal opinion is irrelevant to the task of a sentencing jury. *Brooks v. Kemp*, 762 F.2d at 1408. Nevertheless, deterrence is a valid rationale for the imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 184-87, 96 S.Ct. 2909, 2930-2932, 49 L.Ed.2d 859 (1976). A jury is not barred from considering deterrence in its choice of punishment. *Brooks v. Kemp*, 762 F.2d at 1407-1408; *Collins v. Francis*, 728 F.2d 1322, 1339-40 (11th Cir.1984). Technically the phraseology avoided the expression of personal opinion ("I submit") and the content of the argument was clearly proper. We find no impropriety.

[13] 3. Finally, Drake complains that Huff referred improperly to Gary Gilmore: "Gary Gilmore, if your Honor please, will never kill anyone else again."

It would have been completely proper for Huff to have argued "If Henry Drake is executed, he will never kill again." Such a comment would have been acceptable as a reference to the specific deterrence (or incapacitation) effect of the death penalty. The remark is such a tautology that it could hardly be seen as potentially prejudicial. Referring to Gilmore, a man executed near in time to Drake's trial, was not improper. Read in context, the argument did not invite an unfair comparison between the two men.

IV. WAS DRAKE'S SENTENCING HEARING FUNDAMENTALLY UNFAIR?

The only improper argument at Drake's sentencing was the use of old Georgia Supreme Court cases to suggest that mercy was an inappropriate consideration for Drake. Because the improper argument focused solely on

the propriety of mercy, we do not believe that it influenced the finding of aggravating circumstances.[13] We must, however, determine whether there was a reasonable probability that the improper argument changed the jury's exercise of discretion in choosing between life imprisonment and death. *See Brooks v. Kemp*, 762 F.2d at 1408-1409 (Georgia sentencing jury has two tasks; arguments infringing upon either may require relief).

[14] As our previous discussion shows, the extended quotation was misleading, legally incorrect and prejudicial. Huff neglected to inform the jury that the quoted cases were over 100 years old. Thus, the jurors would probably have understood the quotations to reflect contemporary "law" in the state. Huff's argument constituted an affirmative misrepresentation of the law. Following the finding of an aggravating circumstance, the jury is granted full discretion to impose life imprisonment or death. Just as retribution is an appropriate justification for imposing a capital sentence, *Brooks v. Kemp*, 762 F.2d at 1407, a jury may opt for mercy and impose life imprisonment at will. The ultimate power of the jury to impose life, no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale.

To state that mercy towards a defendant in a capital case contravenes the law or is frowned upon by the Supreme Court of Georgia strikes at the core of the jury's role in capital sentencing. Huff's claims that mercy is "sickly sentimentality," "false humanity," and a "danger-

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13. The aggravating circumstances found in this case are discussed at note 11, *supra*.

ous element for the peace of society," were fundamentally opposed to current death penalty jurisprudence. Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

Finally, the remark's prejudice exceeded even its factually misleading and legally incorrect character because of the attribution to the Georgia Supreme Court. Absent the attribution, the claim would have been severally prejudicial. Telling the jurors that the sentiment was that of the highest court in the state created a severe danger that they would defer to such an expert legal judgment in their choice of penalty.[14] Even though this was the sole impropriety in Huff's closing, it is extremely disturbing.

In considering this argument in light of the facts of this case, we conclude that Drake has shown a "reasonable probability" that this improper remark caused the death verdict. While the evidence of a vicious attack on Eberhart was overwhelming, the evidence to implicate Drake was not. *See Brooks v. Kemp,* 762 F.2d at 1402 n. 27 (recognizing that it is appropriate in this context to consider weakness in the evidence of guilt since an important aspect of the jurisprudence is to minimize the risk that an innocent person will be executed); *see also, Strickland v. Washington,* — U.S. —, —, 104 S.Ct. 2052, 2069, 80 L.Ed.

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14. In its general charge, the trial court did briefly instruct the jury that it could consider facts in mitigation, defined as not constituting justification or excuse, but which in fairness or mercy may be considered in extenuation. Although helpful, we do not view this as curing the strongly improper impact of Huff's argument.

2d 674, 699 (1984) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). The state's case against Drake was made almost completely by co-defendant William Campbell, who was trying to deny his own involvement in the crime.[15] Drake did have witnesses supporting his alibi. The jurors deliberated at length before finding Drake guilty, and the court's felony-murder and aiding and abetting instructions make it impossible to know how they viewed Drake's involvement in the murder itself. Under all the circumstances of this case, Huff's extremely improper use of the century-old Georgia Supreme Court cases to suggest the impropriety of mercy "undermine[s] confidence in the outcome" of his sentencing proceeding.[16] *Strickland v. Washington*, — U.S. at —, 104 S.Ct. at 2069, 80 L.Ed.2d at 698. We conclude that the improper argument rendered Drake's sentencing proceeding fundamentally unfair.

For the foregoing reasons, Drake is entitled to relief with respect to the sentencing phase on his prosecutorial argument claim.

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15. Campbell later recanted his testimony and claimed to have committed the crime himself. The recantation was the basis of Drake's extraordinary motion for new trial which was rejected. *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180, *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1322 (1982).

16. We find the remark so serious under the circumstances of this case that we consider it despite the lack of an objection. This kind of remark was so improper that the trial court should itself have interrupted and stopped the prosecutor. ABA Standards for Criminal Justice, 3-5.8(e) (1980) ("It is the responsibility of the court to insure that final argument to the jury is kept within proper accepted bounds").

SECTION THREE: CONCLUSION

For the reasons stated in Section One, the judgment of the district court denying habeas corpus relief on the Sandstrom issue is REVERSED. The case is REMANDED to the district court with instructions to grant the writ of habeas corpus, conditioned upon the state's affording Drake a new trial.

For the reasons stated in Section Two, the judgment of the district court denying habeas corpus relief on the prosecutorial argument issue is REVERSED.

With respect to the issue whether the trial court's instructions at sentencing properly informed the jury of their absolute discretion not to impose death, we reinstate the panel opinion AFFIRMING the district court's denial of habeas corpus relief. [17]

APPENDIX A

CHARGE TO THE JURY

Ladies and gentlemen of the jury, in this case of the State versus Henry Drake, the Grand Jury of this County has returned an indictment against Henry Drake, charging him with the offenses of murder and armed robbery. And the charges as expressed in the language of the indictment is, in substance, as follows:

> "The Grand Jurors selected, chosen, and sworn for the County of Madison, to wit," and then names them, "in the name and behalf of the citizens of Geor-

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17. We decline to reach the other issues on appeal, exercising our discretion not to do so in light of our resolution of the case granting relief on other grounds.

gia, charge and accuse Henry Drake of the county and state aforesaid with the offense of armed robbery. For the said Henry Drake, on the 5th day of December in the Year of Our Lord, 1975, in the county aforesaid, did then and there, unlawfully, and with force and arms, with the intent to commit theft, took from the person of and in the immediate presence of C.E. Eberhart the following property, to wit: $300 in cash—of the value of $300—and one Timex men's watch of the value of $10, both of said properties being the property of C.E. Eberhart, by the use of a certain claw hammer and a certain knife, the same being offensive weapons, contrary to the laws of this state and the good order and peace and dignity thereof.

"Count 2: And the Grand Jurors aforesaid, on their oath aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Henry Drake with having committed the offense of murder. for the said accused in the county aforesaid did then and there, unlawfully, and with force and arms, and with malice aforethought, kill and murder C.E. Eberhart, a human being, by beating and hitting him about his head and body with a certain claw hammer, and by stabbing him with a certain knife, on the 5th day of December, 1975, at which time a mortal wound and wounds were inflicted upon the said C.E. Eberhart by the said accused in the aforesaid manner of which said wound and wounds of said C.E. Eberhart died on the 21st day of March, 1976, contrary to the laws of said State, the good order, peace and dignity thereof."

Now ladies and gentlemen of the Jury, to this indictment the Defendant has filed and entered his plea of "not guilty." Neither the indictment nor the Defendant's plea of "not guilty" are evidence and are not to be regarded as evidence. Together, however, they frame the issues which you are to decide and determine.

The Defendant enters upon the trial of this case with the presumption of innocence in his favor, and that presumption remains with him throughout the trial until and unless the State carries the burden of proving the material allegations of this indictment beyond a reasonable doubt. In determining whether the State has carried this burden, you will consider all of the evidence which has been introduced here during the trial before you. Now ladies and gentlemen, a reasonable doubt means exactly what it says. It is a doubt based on reason and for which a reason can be given. A reasonable doubt may arise through a consideration of the evidence or because of a lack or insufficiency of the evidence. A reasonable doubt is not a vague or conjectural doubt, it is not an imaginary or arbitrary doubt, and it is not a capricious or fanciful doubt. Neither does it means a possibility that the Defendant may be innocent, but it means a doubt for which a specific reason can be given. Now while the law requires the State to prove the Defendant's guilt beyond a reasonable doubt yet the law does not require the State to prove the Defendant's guilt to an absolute or mathematical certainty.

Now ladies and gentlemen, in a criminal case, which this is, the law makes you the judges of the facts and the law. The facts you obtain from the evidence produced to you throughout this trial. The law you obtain from the Court as given you in Charge. I instruct you that any verdict that you may render in connection with the matter now before you for determination should be arrived at from these facts and as you find them to be, applying those facts to the law as given you in Charge by this Court.

Now ladies and gentlemen of the Jury, you are made by law the exclusive judges of the credibility of the wit-

nesses and the weight you shall give their testimony. That applies to all the witnesses in this case. In determining their credibility, you may consider all the facts and circumstances of the case. You may consider the witnesses' manner of testifying. You may consider their intelligence. You may consider their means and opportunity they had of knowing the facts to which they testified. You may consider the nature of the facts to which they testified. You may consider the probability or improbability of their personal credibility insofar as the same may legitimately appear from the trial of this case. The law also directs, ladies and gentlemen, that it shall be your duty to so reconcile all conflicting testimony, if there is such in this case, whenever it can be done so, that all the witnesses may be made to speak the truth, and perjury impuded or attributed to none. But if there is any testimony in this case which is in such irreconcilable conflict that this cannot be done, then it would be your duty to believe the evidence which seems most reasonable and believable to you, considering all the facts and circumstances of the case.

Now ladies and gentlemen, I charge you that to impeach a witness is to show to the satisfaction of the Jury that such witness is unworthy of belief. A witness may be impeached by disproving the facts testified to by him or her, or by proof of contradictory statements previously made by him or her as to the matters relating to his or her testimony and to the case. When a witness shall have been successfully contradicted as to a material fact, his or her credibility as to other matters shall be for you, the Jury, to determine; but if a witness shall swear willfully and knowingly falsely, you have the right, though not the duty, to reject his or her testimony in its entirety un-

less you find his or her testimony to be corroborated by other unimpeachable evidence. The credit to be given to a witness's testimony, where impeached for contradictory statements out of Court, shall be for you, the Jury, to determine, the credibility of witnesses being a matter always to be determined by the Jury under proper instructions from the Court. If an effort has been made to impeach a witness or witnesses, that would be for you—either in-Court statements or otherwise—that would be for you to determine. In the final analysis, ladies and gentlemen of the jury, the weight and credibility to be given any evidence is a question for you, the Jury, to determine.

Now ladies and gentlemen of the Jury, I charge you that the Defendant in this case has introduced evidence tending to show that he was not present at the time and place of the commission of the alleged offense for which he is here on trial — offenses. If, after the consideration of all the evidence, you have a reasonable doubt that the Defendant was present at the time the crime or crimes was or were committed, he is entitled to an acquittal.

Ladies and gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. I charge you that the acts of a person of sound mind and discretion are presumed to be the products of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but both of these presumptions may be rebutted. I charge you, however, that a person will not be presumed to act with criminal intent but the trials of fact may find such intent from consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act to which the accused is here prose-

cuted. You are the triers of the facts; therefore, it is a question of fact solely for your determination as to whether or not there was a criminal intent on the part of the Defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now while a criminal intention may be proven in more than one way, the question of whether the Defendant did act with criminal intention is finally and always a question for you, the jury, to determine.

Now ladies and gentlemen of the Jury, one of the offenses charged in this indictment is that of murder. I charge you that a person commits murder when he is unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifest by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Legal malice is not necessarily ill will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time the killing was alleged; but it is not necessary for that intention to have existed for any length of time before the killing. In legal contemplation, a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it is done. In other words, murder is the intentional killing of another human being without justification or mitigation.

Now I charge you further that a person commits the crime of murder when in commission of a felony he causes the death of another human being irrespective of malice. I charge you that if you believe, beyond a reasonable doubt, that any time before this Bill of Indictment was returned and filed with this Court by the Grand Jurors named therein, that this Defendant on trial did kill the person named in the indictment in the manner as alleged and that this killing was with malice aforethought, either express or implied, and further that the intention to kill such person was present as a necessary ingredient to such crime, then you would be authorized to find the Defendant guilty of murder as charged. On the other hand, if you have a reasonable doubt as to the Defendant's guilt of the offense of murder, then it would be your duty to give him the benefit of that doubt and acquit him insofar as the charge of murder is concerned. I charge you that if you find beyond a reasonable doubt that the Defendant committed the homicide alleged in this Bill of Indictment at the time he was engaged in the commission of a felony, to wit, armed robbery, you would be authorized to find him guilty of murder. In this connection, I charge you that in order for a homicide to have been done in the perpetration of this particular felony, there must be some connection between the felony and the homicide. The homicide must have been done in pursuance of the unlawful act and not collateral to it. A homicide is committed in the perpetration of a felony when it is committed by the accused while he is engaged in the performance of any act required for the full execution of such felony. I charge you that if you find and believe beyond a reasonable doubt that the homicide alleged in this indictment was caused

by the Defendant while he, the said accused, was in commission of a felony, as I have just given you in Charge, you would be authorized to convict the Defendant of murder; and this you would be authorized to do whether the Defendant intended to kill the deceased or not. A homicide, though unintended, if committed by the accused at the time he is engaged in the commission of some other felony, constitutes murder.

Now I charge you further that in regard to armed robbery: a person commits armed robbery with the intent to commit theft; he takes property of another from the person or the immediate presence of another by actual use of an offensive weapon. The essential elements of the offense that the State must prove beyond a reasonable doubt are: the taking must have been with a purpose to commit a theft. It must have been against the will of the person robbed, and it must have been by open, menacing, immediate threat or use of an offensive weapon. An offensive weapon is one which if used in its usual, accustomed manner is likely to produce death. The character of a weapon as such may be established by direct or by other evidence sufficient to establish it to be an offensive weapon. If you find and believe beyond a reasonable doubt that the Defendant committed such offense, you would be authorized to find the Defendant guilty of armed robbery.

Now ladies and gentlemen of the Jury, I charge you that it is not necessary that the crime of murder be a part of the original design to commit the offense of armed robbery, but it is enough that it be one of the incidental and probable consequences of the execution of the design of the parties, and should appear at the moment to one of the participants to be the expedient to the common pur-

pose. In such case, the intents and acts of the actual slayer is imputed to the other party, although he be merely present and participating in the original design and he himself does not inflict the mortal wound.

Now, ladies and gentlemen, the law permits, as experts, witnesses who have had special training, knowledge and experience in certain lines, to give their opinion based upon their knowledge of particular matters. The weight which is to be given the opinions of expert witnesses is for you to decide. You may accept it and act on it or reject it and then act on your own judgment as you apply it to the evidence in this case.

Now ladies and gentlemen, evidence is of two kinds: direct evidence and indirect or circumstantial evidence. Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issues by proof of various facts sustaining, by their consistency, the hypothesis or conclusion claimed. The comparative rate of circumstantial evidence and direct evidence on any given issue in which they are in conflict is a question of fact for determination by the Jury, if any. To warrant a condition of circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. When the guilt of the Defendant depends on circumstantial evidence alone, which is a matter for you to determine if it does or not, the rule is that each separate fact or issue linked in the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proven beyond a reasonable doubt.

A fact or circumstance not so clearly proven shall not be considered by the Jury as part of the chain of circumstances but should be rejected by you. The circumstance so proven must be a complete unbroken chain and must not only be consistent with the Defendant's guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. If one or more of the circumstances relied on by the State are not so clearly proven and for that reason you reject one or more of the circumstances so relied upon, then you would imply where the remaining circumstances which you believe are so clearly proven to establish the guilt of the Defendant beyond a reasonable doubt, and are inconsistent with any other reasonable hypothesis save that of his guilt.

Now ladies and gentlemen of the Jury, I charge you that in this type case, a felony, you cannot lawfully convict upon the testimony of another person concerning the commission of the crime alone. Before a condition is authorized, the testimony of another person concerned in the the commission of the crime must be corroborated and supported by proof of independent facts or circumstances which of themselves lead to an inference of the guilt of the Defendant, not only that the crime charged was committed, but that the Defendant was a person concerned with its commission. In other words, the corroboration must be not only to the effect that the crime was actualiy committed by someone, but also must be such as to connect the Defendant with the criminal act as a person concerned with commission of crime. The testimony of one person other than the Defendant concerned in the commissions of crime, if there be more than one in your de-

termination, if satisfactory to the Jury, may be sufficient corroboration of the testimony of another person other than the Defendant concerned in the commission of the crime in a felony case.

Now ladies and gentlemen of the Jury, I charge you further, that every person concerned in the commission of a crime is a party thereto, and may charged with and convicted of a commission of the crime or crimes. A person is concerned in the commission of a crime if he directly commits the crime himself or intentionally aids or abets in the commission of the crime or intentionally advises, encourages, counsels, or procures another to commit the crime or crimes. The phrase "aids and abets" comprehends any and all assistance given by acts, words, or encouragement in the commission of a criminal act, with knowledge of the criminal purpose of the perpetrator.

Now ladies and gentlemen of the Jury, I charge you further that an admission or incriminatory statement as applied to a criminal case is a statement by the Defendant made out of Court and in advance of the trial of fact, or facts pertinent to the issues are tending in connection with other facts and circumtances to prove the guilt of the accused or to disprove some defense set up by the accused. Whether the Defendant did or did not make any admissions or such statements is a question of fact for you to determine. All admission, or statements, if proved to have been made, must be scanned with care and received with great caution. They must have been made freely and voluntarily without the slightest hope of benefit or the remotest fear of injury. If not thus made, they cannot be considered by you in arriving at your verdict, and

should be entirely disregarded in your deliberations. An admission or statement will not without, or of itself, authorize conviction; and before you would be authorized to convict there must be other proven facts and circumstances which corroborate the admissions and, in conjunction therewith, satisfy your minds beyond a reasonable doubt of the guilt of the accused. An admission or such statement, if there be such in this case, would be classified as circumstantial evidence.

Now ladies and gentlemen of the Jury, I charge you that a conviction must not rest upon suspicion, conjecture, or possibility of guilt. Where all the facts and circumstances of the case and all reasonable deductions therefrom present two theories, one of innocence and the other of guilt, if the Jury so finds, the Jury would be authorized to and should acquit the Defendant. On the other hand, should you find that the State has proven beyond a reasonable doubt every material allegation on one or both of the charges alleged in the indictment, in this case you would be authorized to convict if you believe this beyond a reasonable doubt.

Now I charge you: in a criminal case, the prosecution is not called upon to produce every eyewitness to the transaction. The burden which the law places upon the prosetion is to establish the Defendant's guilt of the crime charged by competent evidence beyond a reasonable doubt. I further charge you that no presumption unfavorable to the State would arise from the failure to introduce them as witnesses.

Now ladies and gentlemen of the Jury, I charge you that the purpose of this trial, and indeed every legal in-

vestigation, is to discover the truth, and that is the purpose of this legal investigation and all other legal investigations. Now ladies and gentlemen, the ultimate question which the Court submits to you at this time is the question of the Defendant's guilt or innocence of the two crimes charged. You would not concern yourselves with any ultimate questions save that, at this time, of the guilt or innocence of the charges in the indictment.

Now ladies and gentlemen of the Jury, I charge you further that if I as Judge of this Court have said or done anything during the course of this trial which indicate to you that I had a desire or preference as to which of the parties should prevail, either the State or the Defendant, I want you to completely disabuse this from your mind. I cannot, and do not, have a desire or preference in this case as to which party should prevail. It is my duty to see that this trial is fairly presented to you, according to the Law, and leave it to you, ladies and gentlemen of the Jury, to reach a fair and true verdict that speaks the truth in this case; and I do so leave it to you.

Now ladies and gentlemen of the Jury, your verdict, whatever it may be, must be the unanimous verdict of all 12 Jurors. Now no Juror is required to surrender his or her honest opinion because an honest difference— different opinion of another Juror or other Jurors — for the purpose of reaching a unanimous verdict. Jurors should consult with one another and deliberate with a view of reaching a unanimous verdict consistent with their consciences and oath as Jurors. Each Juror must make an individual decision but only after a fair and

impartial consideration of the entire case with their fellow Jurors. A Juror should not hesitate to re-examine his or her views and change his or her opinion if after fair and impartial discussion and deliberation with other Jurors, the Juror is honestly convinced that he or she should change his or her opinion. Every effort consistent with the instructions I have just given you, and with your consciences and oath as Jurors, should be fairly and honestly made to reach a unanimous verdict in this case. However, this is not to say that you should surrender your conscientious convictions as an individual. This case, ladies and gentlemen, must be decided by some Jury, selected in the same manner as this Jury was selected, and there is no reason to believe that a better qualified Jury than yourself would ever be chosen.

Now ladies and gentlemen of the Jury, the Court further charges you that your duty at this time is to go to your Jury Room; make no deliberation concerning this case until the Court sends you word to start. Until that time, you will be under the same instructions as the Court has previously given you when you were at recess. When the Court sends you instructions to start deliberations, then you may do so, but not until that time. After you've started your deliberations, the first thing that I would suggest that you do is to elect a foreman. After that, the evidence, the documentary items will be brought in to you, and after that you may begin your deliberation.

Now ladies and gentlemen of the Jury, in regard to impeachment of witnesses, I further charge you that a witness may be impeached by prior convictions of the witness of a felony.

Now ladies and gentlemen of the Jury, I charge you that the form of your verdict in this case will be, as to Count 1, "We, the Jury, find the Defendant," either "guilty" or "not guilty of Count 1." And I charge you that the form of your verdict in regard to Count 2, which is murder, is: "We, the Jury, find the Defendant guilty," or "not guilty of Count 2." You will date it and let your foreman sign it. With this instruction, Mr. Bailiff, take them to the Jury Room.

Ms. McGinnis has served as an alternate Juror in this case and we appreciate it very much and I wish I could say to you you could go home, but I'm going to have to ask Mr. Seagraves to find you a place to sit and make yourself comfortable. You can't go with the Jury but you will have to go to another place and not have any discussion with anybody.

JAMES C. HILL, Circuit Judge, specially concurring:

I concur in the judgment of the court because the instruction in this case violated the rule articulated by this circuit in *Davis v. Kemp*, 752 F.2d 1515 (11th Cir.1985) (en banc), and by the Supreme Court in *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). I reiterate my view that *Davis*, and now *Franklin*, represent new rules of law extending the case of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) to a set of facts with which that case was unconcerned. *See Davis*, 752 F.2d at 1522 (Hill, J., dissenting).

I also conclude that the error occasioned by this impermissible burden shifting instruction was not harmless, but I believe the analysis by which the court reaches that

conclusion to be redundant. In determining whether an erroneous jury charge was harmless we look to see whether the jury's conclusion of guilt could have been tainted by the error. Here we deal with intent; if intent is not a question of fact there is no possibility of harm. However, the *reason* intent is not at issue—whether it was uncontested or contested in the face of overwhelming evidence —is immaterial. For this reason I believe the majority's two part formula is unnecessary and that the proper inquiry is simply whether intent was at issue in the case.

I further concur in section two of the majority's opinion holding prosecutorial remarks made during the sentencing phase of Drake's trial were fundamentally unfair in violation of *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). I do so because I agree that "[t]he only improper argument at Drake's sentencing was the use of old Georgia Supreme Court cases to suggest that mercy was an inappropriate consideration for Drake." Majority Op. Slip op. at 4590, at 1460. In light of the extensive history of litigation on this single issue, both in state and federal courts, I consider it not entirely inappropriate to make the following observation.

In this country, trials are conducted through the adversarial system. When that system operates properly, one of the advocates is inhibited from overreaching by well-founded apprehension that the other advocate may, by skill, seize the overstatement and turn it upon its author. Had the adversarial system functioned properly when a prosecutor first resorted to quotations from *Eber-*

hart,[1] the courts of Georgia would probably have heard that argument no more.[2] The prosecutor, welding his case to the *Eberhart* opinion before a jury in a deep South Georgia county could have been made to regret that choice —for his case and, perhaps, his political future.

An adversary who had done his homework would have found that the *Eberhart* opinion was wirtten by Georgia Supreme Court Justice Henry Kent McCay (pronounced, I am told, 'McCoy'). Some jurors in a Georgia courtroom might have taken an interest in just how McCay reached the State's Supreme Court, where he wrote denouncing the mercy he had observed in the character of Georgians.

McCay was a native of Pennsylvania who moved to Georgia after graduating from Princeton. Although he served in the Confederate Army, and was wounded, he displayed what an advocate might have termed opportunism when the conflict ended. Georgia was defeated.

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1. *Eberhart v. State*, 47 Ga. 598 (1873).

2. Unfortunately, such has not been the case. *See Young v. Kemp*, 758 F.2d 514 (11th Cir.1985); *Potts v. Zant*, 734 F.2d 526 (11th Cir.1984), 575 F.Supp. 374 (N.D.Ga.1983); *Drake v. Francis*, 727 F.2d 990 (11th Cir.1984). *See also Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (Ga.1980); *Zant v. Campbell*, 245 Ga. 368, 265 S.E.2d 22 (Ga.1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (Ga.1980); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (Ga.1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (Ga.1979); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (Ga. 1978); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (Ga.1978); *Lamb v. State*, 241 Ga. 10, 243 S.E.2d 59 (Ga.1978); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (Ga.1978); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (Ga.1977); *Jackson v. State*, 219 Ga. 819, 136 S.E.2d 375 (Ga.1964); (approving the reading of *Eberhart*).

The political opportunities available at that time were not for those who stood by defeated and resentful comrades; they were found only in the military reconstructionist government. McCay lingered not long among his people. He embraced the reconstruction party, joining Georgians called "scalawags"[3] by their fellows. He was rewarded with an important post in the Constitutional Convention of 1868 in which no Georgian who did not join the perceived oppressors was permitted to serve. Indeed, McCay chaired that convention's committee on the judiciary, and it was not unexpected that the new government's first governor, Rufus Bullock, appointed McCay to the new Georgia Supreme Court.

In that high office McCay saw to the complete control of the military government over Georgia—and it was there that he wrote his opinion in *Eberhart*, deploring and denouncing mercy typical of the citizens of that state. It was of this Supreme Court that the Atlanta Constitution was later to say, "Judas Iscariot and Benedict Arnold would blush if compared" to these.

When defense counsel had completed that short history course, might not he have said something like

> I am not surprised that these words on mercy were written by 'Justice' McCay who came to high office only with the backing of the merciless bayo-

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3. Scalawag has acquired a dictionary definition: "Scalawag" n. [origin unknown] 1: rascal, scamp, reprobate; 2: an animal of little value, esp. because of poor feeding, smallness, or age; 3: a white Southerner acting as a Republican in the time of reconstruction after the Civil War. See also "scalawagery," n. the conduct or doings of a scalawag.

Websters Third New International Dictionary (1971).

> nets of the oppressor. But I am astounded and outraged that these words should be quoted here, gleefully, by our Solicitor, elected by the people of our county, as a statement of the sort of people you ought to be!

Then he might say, softly, "remember the man the prosecutor quotes when you vote in the jury room—and perhaps, in our next election."

The adversarial system did not, however, work to nip this prejudicial argument in the bud. It has, oddly, remained for a federal court to silence Justice McCay's opinion in Georgia's courtrooms.[4]

KRAVITCH, Circuit Judge, concurring:

I concur in Part One of the majority opinion holding that the instruction constituted a *Sandstrom* violation and was not harmless error.

I concur in the result only of Part Two, holding that the prosecutor's argument rendered the sentencing phase of the trial fundamentally unfair and was not harmless error under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). I do not agree, however, with

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4. I have suggested defense counsel's view of Justice McCay. In fairness, it should be observed that he was an able and distinguished jurist who can well be seen as one who strove mightily to lead his state through the perils of a trying time. Those interested in further information about this complex man are referred to an excellent article by the late Alexander Lawrence of the Savannah Bar and Judge of the U.S. District Court for the Southern District of Georgia, *Henry Kent McCay —Forgotten Jurist,* Georgia Bar journal 5 (1946-47) reprinted in *Cleo and the Courts: Tapping the Historical Resources of the Southern Federal Judiciary 1789--Present* 185 (1984).

the use of the *Strickland v. Washington* test in this context.

JOHNSON, Circuit Judge, specially concurring:

Although I concur in the result reached in this case, I write separately to emphasize my belief that it can be reached by a more direct route than that selected by the majority. The majority finds that the *Sandstrom* error cannot be harmless because the jury returned a general verdict on a defendant indicted on three theories of murder, and as to one of those theories—aiding and abetting—the evidence of intent was not "overwhelming." This complicated inquiry into multiple theories of liability becomes necessary because of a premise adopted by the majority at the beginning of its argument: that "evidence of intent [can be] overwhelming, even where there is conflicting evidence as to whether the defendant was the killer." 762 F.2d at 1454. This premise, which forecloses the more straightforward holding that the evidence was not "overwhelming" as to the malice murder charge, was first introduced by the majority in *Davis v. Kemp*, 752 F.2d 1515 (11th Cir.1985) (en banc). I rejected this approach when it was presented in *Davis*, and I find here, as well, that it provides an unsuitable basis on which to build the majority opinion.

The *Davis* majority stated that "[a]lthough some opinions talk in terms of overwhelming evidence of guilt . . . the crucial inquiry relates to whether or not there is overwhelming evidence of intent." 752 F.2d 1521 n. 10. The consequence of this understanding was that the Court was able to limit itself to the inquiry of whether the evidence that "whoever killed the victim did so with intent" was

overwhelming, 752 F.2d 1521, without considering the weight of the evidence that Davis was the killer. This consequence is elevated to the status of a rule in the majority opinion in this case: a court can find "overwhelming" evidence of intent even where there is no "overwhelming" evidence that the defendant was the individual who committed the act. The flaw in this new rule is the same as that in *Davis:* while it is necessary to limit the court's scrutiny to evidence of *intent*, because the jury's determination of intent is the only one that could be affected by the erroneous instruction, it is also necessary to limit the court's scrutiny to evidence of the *intent of the defendant* because it is *his* connection with the crime that is to be tested at trial.[1] If a court evaluates the evidence of the killer's intent without simultaneously evaluating evidence that the defendant is the killer, it may finish by evaluating evidence wholly inapplicable to the suspect on trial. Efforts to render such evidence applicable retroactively, on

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1. Although the Supreme Court in *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) concluded that it was evidence of *intent* rather than evidence of *guilt* which must be "overwhelming," the Court neither considered nor affirmed the further conclusion that evidence of intent may be overwhelming where evidence that the defendant was the killer is not. In fact one standard applied by the Court in its harmless error analysis (requiring "evidence so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption" (*citing Connecticut v. Johnson*, 460 U.S. at 97 n. 5, 103 S.Ct. at 973 n. 5 (Powell, J., dissenting)), — U.S. —, 105 S.Ct. at 1977, provides additional support for the proposition that none but the most comprehensive and compelling evidence of intent would be sufficient to render a *Sandstrom* error harmless. While the question remains to be addressed by the Court, it seems unlikely that the evidence would be construed to meet this elevated standard where it failed overwhelmingly to establish the identity of the killer.

the ground that the jury ultimately found that the defendant committed the act, are also inappropriate. A court reviewing for *Sandstrom* violations must know the strength of the evidence presented at trial, so it can assess the effect of an instruction delivered at the trial's conclusion. If the evidence presented at trial is reinterpreted in light of conclusions reached by the jury in its verdict, the effect of the erroneous instruction on the jury's deliberation cannot be accurately gauged. Moreover, a rule which made all inculpatory evidence retroactively applicable to the defendant whenever the jury reached a guilty verdict would render the evidence "overwhelming" in every case in which such a verdict had been reached. *Davis v. Kemp, supra,* 752 F.2d at 1528 n. 1. (Johnson, J., dissenting).

I would hold that, because evidence of Drake's intent to commit the murder was not overwhelming, the *Sandstrom* error was not harmless beyond a reasonable doubt when measured by the rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

CLARK, Circuit Judge, specially concurring:

I concur in section one of the majority opinion which holds that the instruction on intent at Drake's trial improperly shifted the burden of proof in violation of *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and that the *Sandstrom* error was not harmless.

I also concur in section two of the majority opinion which holds that Drake is entitled to a new sentencing hearing because of prosecutorial misconduct in closing argument at the penalty phase of Henry Drake's trial.[1] I

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1. However, as I specially concurred in *Brooks v. Kemp,* 762 F.2d 1383 (11th Cir.1985), I cannot totally concur in the majority's reasoning.

write separately only to point out what I believe to have been the most fundamental and egregious error committed by the prosecution at Drake's trial; the utilization of a theory of the Eberhart murder which was totally inconsistent with the state's view of the crime presented at the trial of William Campbell. Despite the other errors which mandate that Drake be retried, I believe it is important to address this claim. The prosecutor's totally inconsistent theories of the same crime at William Campbell's and Henry Drake's respective trials transgressed the Fourteenth Amendment's requirement that a criminal trial be fundamentally fair.

I. FACTS

In order to put Henry Drake's legal claims into proper perspective, it is necessary to examine what we know and do not know of the circumstances surrounding the death of Mr. Eberhart, the state trials of William Campbell and Henry Drake and events that have since come to light.

On the evening of December 5, 1975, the Defendant, Henry Drake, his girlfriend, Mary Carruth, and William Campbell, a friend who was living with Drake and Carruth at the time (TT 157-159),[2] drove from Madison, Georgia, where the three were living, into Colbert, Georgia where Henry Drake's mother and other family members lived (TT 407). The defendant and his girlfriend dropped Campbell off across the street from the barbershop in Colbert

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2. TT refers to the trial transcript from Henry Drake's state murder trial. Drake and Campbell had met while both were inmates at the state penitentiary in Reidsville. Campbell came to live with Drake and Carruth after he was released from prison.

so that he could get a haircut (TT 161-162, 360, 409) and then continued on to the house of the defendant's mother (TT 410-411).

At about 5:00 p.m. Campbell was observed leaning on a car outside the barbership (TT 283-284). At 6:00 p.m. he was no longer outside but the lights in the barbershop were on (TT 284).

At 9:00 p.m. that evening C. E. Eberhart, age 74, was found critically wounded on the floor of his barbershop (TT 290). He had received blows to the head from a claw-hammer and a stab wound (TT 149-150). The floors and walls of the barbershop were smeared with blood as though an extended struggle had taken place (TT 290, 307). Mr. Eberhart was hospitalized but remained in a coma until his death several months later (TT 152-155).

Several days after the attack on Mr. Eberhart law enforcement officers went to the home of Defendant Drake, where Campbell had been staying, to search for Campbell and possible evidence (TT 122, 309, 358, 360). At that time Henry Drake was not considered a serious suspect in the Eberhart incident. Campbell was gone but a watch later identified as belonging to Mr. Eberhart was found in Campbell's room in a dresser along with Campbell's clothes and papers (TT 129, 133, 322). Campbell was arrested by Georgia authorities after he was located in Virginia. Only one week after the attack on Mr. Eberhart he had been arrested by Virginia police for shooting a woman during a robbery (TT 195, 197). Subsequently and only after being implicated by Mr. Campbell, Henry Drake was also arrested.

Drake was originally indicted along with Campbell, but due to a challenge to the grand jury made by Drake's appointed attorney's he was reindicted and his case did not go to trial until one year after Campbell had been tried and convicted and sentenced to death for the murder and armed robbery of Mr. Eberhart.

A. *William Campbell's Trial*

At his own trial Campbell claimed that he was getting a haircut from Mr. Eberhart when Drake came in and began beating the barber over the head with a hammer. Campbell testified that he tried to stop him but that Drake also struck him with the hammer when he did so (CTT 317.[3]

The jury obviously disbelieved Campbell's version of the events as it convicted him of both the murder and armed robbery of Mr. Eberhart, and recommended the death penalty for the murder. *See Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1978)*cert. denied*, 439 U.S. 882, 99 S.Ct. 218, 58 L.Ed.2d 194 (1978).[4]

In his argument to the jury the prosecutor stated:

> I think this evidence reflects and you can so find that Drake was pretty well known around Colbert and Campbell was to be the man to case the joint. I have

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3. CTT refers to the trial transcript of William Campbell's state trial.

4. The Georgia Supreme Court apparently believed that Campbell was the murderer as well. In its proportionality review of his sentence, that court stated: "The evidence shows that the appellant mercilessly bludgeoned an elderly man eventually to his death with a claw hammer." 240 S.E. 2d at 832.

no doubt in my mind that he probably helped Mr. Eberhard sweep the floor and he probably left and waited around and came back, probably real close, where he waited around there and then came back and Mr. Eberhart was fixing to close and Mr. Eberhart opened that door back up and letting them in. I think that right there is probably when he stuck that knife in him and that is when the struggle began. Yes, he is not as big a man as Mr. Eberhart and that is why they had one hellacious struggle. He was drinking, and his adrenalin glands were working, because he was smaller, and that is why he took the knife and stuck it in him and it weakened the old man and they fought. . . . Now, who did it, Campbell, Drake, and you know what I say on this evidence, does it really matter which one, or the two, or if they were in it together. *It is my thoughts on this evidence that this is the actual slayer, Mr. Campbell is, of Mr. Eberhart,* because you see that no one knew who Campbell was, except some of the Deputy Sheriffs and very few people. You see Campbell told the GBI agent, "Yeah, I threw the hammer." Now, why would he tell this, because he knew that he had handled that hammer and he felt like that there might be a fingerprint on it, and that was the way he was covering his tracks, to say that, Yes, I handled the hammer. The Barber Tools, he also stated that he handled those, also, and he was covering his tracks again. Would you look at those poor little old barber tools. Who on earth would kill a man for a few little old barber tools. Look at that. Here they are, didn't have anything, didn't work for anything. He is the guy that would do a thing like this, to pick up those tools and carry them out of there with him, this garbage and

> I submit in a case of this nature that that is all that is, is garbage, that any man that would carry those little clippers ou. of there. Anyone that had gone through all of this and kill somebody and had to w..sh up and all, who after getting the money would take the time to stop to steal a few little old barber tools, except someone like William (Bill) Campbell that you have ever seen, nobody, nobody. You know the first thing we have to do is that we have to get the defendant present and put a motive in there and then we put him running. *Campbell admits the entire case against him except that he didn't do it, that Drake did it. I don't believe that you ladies and gentlemen are going to buy that kind of story and say that, "You are right", and set him free.* What would he say on Drake's trial? . . . They are both a part of this crime of robbery and murder and there is no mistake about it, under the evidence.

(CTT at 343-44) (emphasis added). At the penalty phase of Campbell's trial the prosecutor continued:

> Your honor, please, there is one person who believes in capital punishment, and that is the murderer. He believes in capital punishment. He believes in it without a Judge or Jury or a public hearing where the friends and relatives of the victim and the public can attend. This Defendant believes in it for he similarly killed his victim, and then went to Virginia and attempted to do the same thing.

(CTT at 385).

B. *Henry Drake's Trial*

Despite the jury's rejection of Campbell's account of the crime, one year later the State called him as its key

witness in the trial of Drake and had him reiterate this same story (TT 167-70, 188). In Drake's case, the state argued that "[he] Drake must have been the one who actually beat the victim" due to Campbell's poor health. *Drake v. State,* 241 Ga. 581, 247 S.E.2d 57 (1978) *cert. denied,* 440 U.S. 928, 99 S.Ct. 1265, 59 L.Ed.2d 485 (1979).

William Campbell was the only witness in Henry Drake's trial who implicated Drake in the murder and robbery of Mr. Eberhart; and his testimony was strikingly different from the account given by the other witnesses at trial.

Henry Drake and Mary Carruth both testified that after dropping Campbell off for his haircut, they drove to Drake's mother's house where they had supper and visited for about two hours (TT 381-82, 410). Drake's mother, brother and brother-in-law all confirmed that Henry and Mary were at Drake's mother's that evening (TT 429, 432, 434). Drake and Mary Carruth further testified that they picked Campbell up across the street from the barbershop on their way out of town and that he told them that he had been in a fight with the barber (TT 352, 422).

Drake testified that about 3:00 a.m. that night Campbell woke him and wanted Drake to drive him back to Colbert because he left his knife and some barber clippers he took from Mr. Eberhart there. [Barber tools were found outside the barbershop (TT 366).] Drake refused to take him (TT 412, 413). The next day, Drake went back to his mother's in Colbert in order to borrow a radio. It was then he found out the extent of Eberhart's injuries. When he got back to Madison, he told Campbell how badly Eberhart was hurt. Campbell then told Drake to drive him to Atlanta (TT 414)

Campbell's testimony, which covers over 100 pages of transcript, varied significantly from that of Mary Carruth and Henry Drake. The thrust of his testimony was that Henry, and Henry alone, robbed and murdered Mr. Eberhart and that Campbell himself was merely an innocent bystander who in fact tried to help the victim. However, Campbell's story was not only difficult to believe in and of itself, it was also filled with contradictions and inconsistencies throughout.

To begin with, Campbell stated that after Drake let him out he hung around the laundromat for ten or fifteen minutes (TT 205). He then walked over to the barbershop. Mr. Eberhart was cleaning up but said he would cut Campbell's hair after he finished sweeping up, so Campbell held the dustpan for him (TT 205).

At first Campbell stated that he and Eberhart did not converse while his hair was being cut (TT 212); however, on recross he admitted that he asked Eberhart for a job while he was cutting his hair (TT 245) [Campbell testified earlier that he had been looking for a job in Colbert, but no one would give him one. There was also testimony that Campbell had been a barber at one time (TT 366-67).]

When the State began questioning Campbell as to the defendant's involvement in the crime, Campbell first stated that he did not see Drake in the barbershop but saw him only in front of the barbershop before and after he [Campbell] got his hair cut (TT 164-65). After considerable prodding by the District Attorney, Campbell changed his story and claimed that while he was having his hair cut, Drake came in with a black wig on [Campbell said he didn't recognize him at first], walked around behind the

barber chair and hit Eberhart in the head with the hammer (TT 168).

At Drake's trial, Campbell said he watched Drake come in and walk around Eberhart. However, as Drake's trial counsel brought out on recross, at his own trial Campbell testified that he did not know Drake was there until he heard Eberhart groan twice and turned around to see Drake hitting him (TT 246). Drake's counsel also brought out on recross that Campbell did not mention any wig at his own trial (TT 243).

As to the wig, Campbell testified first that he did not know what happened to it after the beating (TT 170). Later, he testified that during the struggle Eberhart pulled the wig off Drake (TT 208, 249). Still later he said Drake wore the wig back to the car (TT 213).

On direct, Campbell said that when Henry came into the shop he told Eberhart that he was going to "rob him and take his money (TT 169)," but on cross examination he said Drake did not say anything when he came in (TT 207).

Campbell claimed that he tried to stop Henry from hitting the old man at which time Henry hit him [Campbell] in the head with the hammer (TT 169, 208). In elaborating on being hit by Drake on cross examination, Campbell, already aware of the physical evidence the State was going to present from his own trial, related that when he was hit he fell out of the barber chair over near the door stating that "that's where they got my blood stains, off the door" (TT 208).[5] But Campbell's story of falling by the door

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5. The State did, in fact, present testimony of a forensic scientist that Type A blood scrapings were taken from the door frame; Campbell was typed as A, while Eberhart and Drake were typed as O.

was inconsistent with testimony he gave at his own trial that Drake picked him up and set him by the door (TT 211). This testimony from the previous trial was also inconsistent with Campbell's statement on cross that Henry did not touch him after hitting him with the hammer (TT 209).

Campbell's testimony was particularly inconsistent as to the hammer itself. The hammer was found in the back of a pickup truck located behind the barbershop and Campbell admitted that he threw it there (TT 175), but he had several versions as to where he threw it from. First he stated only that he picked the hammer up at the barbershop and threw it toward the truck (TT 175). On cross examination, he specified that he picked the hammer up off the barbershop floor as he was going out the door (TT 215), and that he did not know where Drake had gotten it from (TT 215). However, after being asked if he had ever said that he had found the hammer in Drake's car, he changed his story and responded, "That's right. As a matter of fact, he kept it in there all the time. He worked on that old car with it (TT 214)." Defense counsel then read Campbell's testimony from his own trial in which he claimed that he found the hammer in Drake's car and threw it "out of the car (TT 216)."[6] When asked to clarify which he had done, thrown it from the barbershop or thrown it from the car, Campbell changed his story for the third time. He claimed that Drake carried the hammer out of the barbershop, laid it down, then stepped on it so

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6. This version was inconsistent with Campbell's earlier statement that the car was parked up the street at the store (TT 126).

that it bounced back to near the door where Campbell picked it up (TT 216). He stated that he [Campbell] hid the hammer inside the car until he could get back to the door. At this point defense counsel gave up hope of getting a straight story about the hammer from Campbell and went on to something else. But further flaws in Campbell's testimony continued to develop.

On direct, Campbell testified that after the incident in the barbershop he did not have any blood on his clothes and did not pay any attention to whether Henry had any blood on him (TT 172). But on cross and recross, he claimed that there was blood on his own shirt (TT 218, 248) saying that he threw the bloody clothes away, but then changing his story to say that Henry or Mary threw them away (TT 248-49).

On direct, Campbell testified that Mary Carruth was behind the barbershop somewhere during these events but that he did not know exactly where (TT 176). On cross, he testified that she was "at the door, beside the door . . . around to the corner door," and that she "come to the door (TT 219)."

Campbell testified that he, Mary Carruth and Drake walked to the car (TT 177) which was parked up the street at the store and then drove to the cemetery and drank a beer (TT 177, 220).[7] He next testified that he went to sleep in the back seat and when he woke up they were back in Madison (TT 178). When asked, "Do you recall the next day?", Campbell responded, "No, sir, Henry [Drake] told me about [it] . . . the next day."

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7. Two Miller Beer Bottles, the kind Campbell said they drank, were found at the cemetery.

Campbell went on to testify that the next day [Saturday] Drake told him that he [Campbell] would have to leave because the barber was expected to die (TT 179-86, 225). While being examined on direct as to this particular portion of events, Campbell was asked what Drake said. He responded, "He said they were looking for that barber to die . . . was robbed that night. I didn't know about it. He told me about it (TT 184)." When questioned further about what was said, he testified that "he [Drake] told me, 'Bill, you've got to leave. I hate to say this, but you got to leave.' I asked him why, and he said, 'Well, what happened last night—they look for that old man to die—.' I was pretty well drinking and I didn't think the old man was hurt that bad (TT 185)." (Emphasis added, underlined portion is Campbell's statement to the court.)

Campbell then testified that Drake drove him to Atlanta and he [Campbell] caught a bus to Norton, Virginia (TT 179-86, 226) where he shot a woman in the hip only a week later while robbing a salvage company (TT 195, 197). Campbell pled guilty to that robbery (TT 186).

Georgia law enforcement officers picked Campbell up in Virginia and returned him to Georgia to face the Eberhart murder and robbery charges. En route Campbell made the following statement regarding the Eberhart killing; "[*You*] *know when a fellow gets to drinking . . . I didn't mean to do it.*" *See Campbell v. State, supra,* 240 Ga. 352, 353, 240 S.E.2d 828 (1977) (*emphasis added*).

Campbell's criminal record at the time of Drake's trial included pleas of guilty to two counts of sodomy in 1967 (TT 197), a plea of guilty to burglary in 1967 (TT 197), a conviction for robbery in 1969 which resulted in a

life sentence subsequently reduced to twelve years (TT 198), a plea of guilty to the robbery in Norton, Virginia and convictions for the robbery and murder of Mr. Eberhart in 1976 for which he received a life sentence and the death penalty (TT 187, 199). Campbell testified that in all he had spent around twenty years in jail (TT 194).

In sum, the testimony offered by the state at Drake's trial consisted of the following; an eye witness testified to seeing Campbell across the street from the barbershop at about 5:00 p.m. on the day of the crime. Blood scrapings taken from the handle of the murder weapon were found to be type A, Campbell's blood type. On the other hand, the only physical evidence associating Drake with the crime was a knife found at the scene of the crime allegedly belonging to him. No finger prints taken at the scene were matched to Drake. The only testimony to place Drake at the barbershop or to implicate him in the murder or robbery was Campbell's testimony, wholly inconsistent and contradictory testimony of an alleged accomplice who had a history of violent crime.

In closing argument in Drake's case the prosecutor, Mr. Huff, the same district attorney who prosecuted Campbell's case, stated:

> Now ladies and gentlemen, I want to talk to you about one other factor. We saw Campbell; you saw him testify, and he talks like this (Mr. Huff is whispering); and the reason he talks like this is a combination of three factors. It's true he lost his false teeth and I think that probably would have helped some. The other is his extreme emphysema that he has. According to officers, that he can't walk even a distance that

he doesn't tire and have to sit down and bend over and heave, because when he exerts himself to the least amount, he is exhausted. And of course, the other reason that he is so used to talking low, it's true, he has spent so many years in prison and that's the way they talk. They don't talk out loud in the prison system. They whisper. He doesn't hardly know how to talk loud, only in a whisper. And I submit to you that Mr. Eberhart, even though he was seventy something years old, that he was a big man, close to 200 pounds, in good health, vigorous, and the testimony was that he led a very active life. And you look at those pictures, and you look what a terrific scuffle took place, and I say to you that under this evidence, William Bill Campbell could not have done all that was done that night. Just that high. Just that high. And I suggest to you, under all that physical evidence, that it took more than little Campbell to have done old Mr. Eberhart in; because we can tell that the old man fought, and he fought, and he fought for his life. And Campbell would have fallen out from sheer exhaustion and emphysema long before those mortal blows would have been done.

C. *The Recantation*

Several years after Drake was convicted and sentenced to death, William Campbell changed his story. On April 24, 1981, he gave the following affidavit:

My name is William Campbell and I was a witness in the trial of Henry Arthur Drake for armed robbery and murder. I lied at this trial. I said Henry was the one who killed the barber, Mr. Eberhart, and that I

tried to stop Henry from killing him. But what I said were lies. I was the one who killed Mr. Eberhart. Henry wasn't even there. He didn't have anything to do with it.

Me and Henry were going to Colbert. Henry was going to see his mamma and he dropped me off at the barber shop and was going to pick me up on his way back to Madison. I went to the barber shop and Mr. Eberhart cut my hair, but he messed my hair up. I tried to get him to fix it but he wouldn't. He got mad and hit me with a hammer. I pulled my knife to try to get the hammer from him. I stabbed him but the blade broke off. I got the hammer away and beat him up. I saw his watch and took it and took about $400.00 out of his pocket, too.

I left the barber shop and waited behind a laundromat until I saw Henry come back. I got in the truck. (I noticed Henry's girl friend had a bowl of Henry's mamma's soup on her lap.) I told Henry about the fight and I told him I thought I might have killed the barber. Henry had to go back to his mamma's for a few minutes. He came back out with a coat or something. Then we went back to Madison.

During the night Henry went back to Colbert to see how the man was doing. In the morning he told me Mr. Eberhart was doing real bad and I'd better leave. I asked Henry to take me to Atlanta. I gave Henry Mr. Eberhart's watch. Henry took me to Atlanta and I stayed there a few days and then took the bus to my hometown, Norton, Virginia. While I was there I robbed a pawn shop and was arrested and got twenty years for armed robbery.

While I was in jail in Virginia an officer from Georgia came to question me about the barber's murder. I figured Henry must have turned me in—told everything and where I was because the officer had the watch that I'd given Henry. I told the officer I didn't kill Mr. Eberhart. I said Henry did it and I said I tried to stop Henry. I didn't do nothing but lie. I lied about Henry because I thought Henry had done me dirty. I thought Henry had turned me in and the way Henry treated me when I came back to Georgia made me keep on lying. Henry was ugly to me at the jail and after my trial, Henry said he and his whole family were glad I got the chair.

But since being here at Jackson I've thought it over and I know it was wrong to lie and I can't go on living like this. I've changed my way of living now. I'm living better and doing right now. I know what I'm saying might hurt my own appeals but I'm not going to worry about it. I don't want to go on lying. I want to get this off my conscience and try to be forgiven by Henry and God Almighty.

I'm willing to go to court to say that I lied in Henry's trial. Also this affidavit may be used in any way that will help change the wrong that I've done.

D. *Subsequent Legal Proceedings*

On the Basis of this affidavit, Drake filed an extraordinary motion for a new trial which was denied by the state trial court after an evidentiary hearing. The Georgia Supreme Court affirmed this ruling *Drake v.* State, 248 Ga. 891, 287 S.E.2d 180 (1981) reasoning that, "[t]he law

is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial." 287 S.E.2d at 182. The State Supreme Court also said that Campbell's recantation was not believable because of his trial testimony as to his poor health (that he was physically incapable of being the sole perpetrator) and the fact that his recantation[8] indicated there was not much blood in the barbershop when he left, was inconsistent with the physical evidence introduced at trial. *Id.*

After certiorari was denied by the United States Supreme Court, Drake filed a petition for a writ of habeas corpus in the United States District Court. The district court denied the petition without a hearing. A panel of this court affirmed that decision, *Drake v. Francis*, 727 F.2d 990 (11th Cir.1984), *vacated and rehearing en banc granted*, *U.S. v. Garrett*, 727 F.2d 1003 (11th Cir.1984).

II. THE LEGAL ISSUE IN CONTEXT

A. *The Reviewing Courts Interpretation of the Two Trials.*

All of the courts reviewing the petitioner's claim of inconsistent theories of prosecution have denied relief but expressed, in varying degrees, concern about the prose-

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8. In addition to the affidavit, William Campbell testified at an evidentiary hearing in the state trial court regarding the new trial motion. His testimony there reaffirmed his recantation. It was at that hearing that he gave the statement regarding the lack of blood. It also must be noted that Campbell had appeals pending when he gave the affidavit and testified. His attorney at that time, Robert Beal, stated on the record that Campbell was testifying against his advice and was aware of the possible adverse consequences, i.e., prejudice to his pending legal matters and a possible prosecution for perjury. (State Habeas Transcript pp. 6-7, before Honorable William F. Grant, Superior Court of Butts County, July 7, 1981).

cutor's actions or at the very least have noted the factual inconsistency in the theories of the case presented at the two trials. The Georgia Supreme Court on direct appeal in Campbell's case noted, "the evidence shows that the appellant mercilessly bludgeoned an elderly man, eventually to his death. . . ." *Campbell v. State, supra,* 240 S.E.2d at 832. However, on direct appeal in Drake's case the State Supreme Court noted: "[In Drake's case, the state argued that he] Drake must have been the one who actually beat the victim [due to Campbell's poor health]." *Drake v. State, supra,* 247 S.E.2d at 59. The state habeas judge reacted as follows:

> *The State did exactly what Petitioner says.* The only issue is whether the pursuance by the State of inconsistent approaches in cases of this kind violates the constitutional rights of either or both of the defendants. In support of this argument, Petitioner cites cases holding that there is a prosecutorial obligation to act in good faith and that prosecutorial misconduct can amount to a constitutional deprivation. In response, the Respondent asserts that the prosecution of the two cases was not inconsistent but conveniently moves on quickly to another subject without saying why.
>
> *The fact is that the prosecutions were inconsistent.* The issue is whether the constitution requires that the State employ basic honesty in prosecuting those accused of crime or whether it can join in the game of seeking a result without much regard for the tactics. The Court does not make this observation lightly and recognizes that the horrible murder of the victim in these cases would likely have moved any community and any prosecutor to do whatever was necessary to bring the responsible parties to justice. *The Court seriously doubts, however, that the Constitution can stand many cases where the expedient of exacting justice overpowers completely all sense of fairplay.*

Drake v. Francis, Civ.Act. No. 4246, slip op. at 10-11 (Superior Court Butts County, 1981) (State habeas opinion) (emphasis added).[9]

After exhausting his state remedies, Drake renewed this claim in his federal habeas petition. The district court found no constitutional error in this claim although the court did recognize the inconsistency of the theories:

> [I]n Campbell's trial the state's theory was that Drake was probably just the "pick up man." In Drake's trial, evidence was revealed that Campbell was not physically able to participate in a struggle such as the evidence indicated had occurred. The State in Drake's trial argued that Drake had to have conducted the brutal beating.

Drake v. Francis, Civ.Act. No. 82-99-ATH, slip op. at 8 n. 4 (M.D.Ga. Dec. 15, 1982).

The panel of this circuit that originally heard the appeal from the district court's denial of federal habeas corpus relief believed the theories were fairly consistent but noted: "Hence the only inconsistent theory proposed in the two trials was that Campbell's prosecutor believed Campbell was the sole murderer while in Drake's case, the district attorney urged that, due to sheer physical necessity,

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9. However, he went on to express his belief that Campbell's and not Drake's due process rights were violated.

> In this situation, it is actually Mr. Campbell (see *Campbell v. State,* supra) and not Petitioner who has the superior right to complain about the tactics of the State because Mr. Campbell was convicted and sentenced to death by a prosecution that contended on another day that he was too old and sick and weak to commit the crime.

Drake must have participated in the attack as well." *Drake v. Francis, supra,* 727 F.2d 994.[10]

A review of the record of Drake's and Campbell's trials, conducted by the same prosecutor, leads me to agree that the theories of the case developed by the state at the two trials were inconsistent but to disagree with the legal conclusion drawn from those events. In my view, the state's action in Henry Drake's trial violated the fundamental fairness requirement stemming from the due process clause of the Fourteenth Amendment.

B. *Fundamental Fairness*

It is the duty of a prosecutor not only to convict but to seek justice. *See* A.B.A. Standards for Criminal Justice, 2d Ed. (1982) § 3-1.1(b)(c); A.B.A. Code of Professional Responsibility, E C 7-3; *see also Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). He has a responsibility to guard the rights of the accused as well as those of society at large. A.B.A. Standards, § 3-5.8(c)(d). This is so because, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A fair trial in a fair tribunal is a basic requirement of due process. *Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). Due process is not a technical conception with a fixed context; it has never been and

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10. The panel also believed, as did the state habeas court, that even if there was a due process violation, it was Campbell's not Drake's rights that were transgressed.

perhaps never can be precisely defined. *Lassiter v. Department of Social Services,* 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). "Fundamental fairness," as a by product of due process, is "a term whose meaning can be as opaque as its importance is lofty." *Id.* Whether or not a particular action or series of actions by a prosecutor in a criminal trial renders that proceeding fundamentally unfair is frequently a judgment that must be made by the federal habeas court after reviewing the challenegd actions in light of the entire record as well as assessing the relevant precedents and the other interests at stake. *Lassiter,* 452 U.S. at 25, 101 S.Ct. at 2158.

In this case, the prosecutor's actions tainted Drake's trial. Campbell told essentially the same story in both trials, i.e. that Drake and only Drake was the murderer. In Campbell's trial, however, the prosecutor attacked that story as unbelievable and argued that Drake was merely the one who "cased' 'the barbershop. Having destroyed Campbell's credibility in that trial and secured one death penalty, he then called Campbell as the state's principal witness in Drake's trial in order to obtain a second one.

Initially it should be noted that clearly, without Campbell's testimony, there would not have been sufficient evidence to support a conviction. Without that testimony this court would have no choice but to grant the writ and order a new trial pursuant to *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Other than Campbell's testimony, as virtually every court to review this

case has conceded, there is almost no evidence linking Drake to the crime.[11]

Second, if the prosecutor did not believe Campbell's testimony but called him anyway, then that would be constitutional error. Obviously the prosecutor either believed or did not believe Campbell. If he did believe him, then the prosecutor should not have prosecuted Campbell or, once he decided that he believed Campbell's story (if this was after Campbell's trial), he should have taken steps to correct the error. If he did not believe Campbell, then the prosecutor used testimony he thought was false in order to convict Drake, a conviction he could not constitutionally otherwise secure.

In *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935) and *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) the Supreme Court made clear that a conviction obtained

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11. In Georgia a defendant cannot be convicted on the basis of an uncorroborated testimony of an accomplice. O.C.G.A. § 24-4-8. The purpose of the corroboration principle is to safeguard against one person falsely maintaining that he and the defendant were accomplices to commit the crime. *Coleman v. State*, 227 Ga. 769, 183 S.E.2d 379, 381 (1971). Slight evidence, either direct or circumstantial, will suffice to corroboate an accomplice's testimony. *Cole v. State*, 156 Ga. App. 228, 274 S.E.2d 685 (1980). However, where the corroboration of the alleged accomplice's testimony is entirely circumstantial and is of itself as consistent with innocence as with guilt, such evidence is insufficient to sustain a verdict. *Reed v. State*, 127 Ga.App. 485, 194 S.E.2d 121 (1972).

The Georgia courts have resolved this issue adversely to the petitioner. A federal habeas court, therefore, cannot review the merits of this claim. *Llewellyn v. Stynchcombe*, 609 F.2d 194, 196 (5th Cir.1980). In my opinion, however, Campbell's testimony did not have sufficient corroboration to meet the test of reliability.

through the use the prosecution of false evidence, known to be such by the state, renders the conviction void under the Fourteenth Amendment.[12] The prosecutor has a duty not only to refrain from soliciting false evidence but also a constitutional duty to correct false evidence that he does not intentionally elicit. *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Furthermore, courts have not adopted a technical conception of "false" evidence or testimony. *Blankenship v. Estelle*, 545 F.2d 510, 513-14 (5th Cir.1977) (testimony does not have to technically be perjurious to fall within the ambit of knowing use of false testimony).

In this case it is not clear what the prosecutor actually believed. We do know, however, that at Campbell's trial he vigorously attacked Campbell's testimony as unbelievable and argued to the jury that Campbell was the actual murderer. The jury likewise necessarily thought Campbell's version of the events was false or it could not have convicted him of murder and returned a death penalty. Furthermore, we know that the prosecutor at no time, either before or after Drake's trial, took any action that indicated he believed Campbell's story.

Therefore, all we can say for certain is that the prosecutor attacked William Campbell's testimony at his trial as unbelievable and argued that Campbell must have been the sole murderer. The jury accepted the prosecutor's version of the events as true and rendered a verdict ac-

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12. This rule applies even if the falsity goes only to the credibility of the witness and the jury has other grounds to disbelieve the witness. *Napue, supra,* 360 U.S. at 269-70, 79 S.Ct. at 1177.

cordingly. One year later, William Campbell was called as the principal witness in Henry Drake's trial. The conclusion seems inescapable that the prosecutor obtained Henry Drake's conviction through the use of testimony he did not believe; bringing this case under the logical if not actual factual framework of *Mooney* and *Napue*.

As the state habeas judge recognized, the prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate that fundamental fairness essential to the very concept of justice. *Lisenba v. California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941). However, it makes no sense to say that only Campbell's due process rights were violated by the inconsistent theories. Either both defendants were prejudiced by the prosecutor's actions or neither's were. This is especially true in this case because the fingerprints, blood tests, and a witness linked Campbell and not Drake to the crime. That evidence is highlighted by Campbell's subsequent recantation.

The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth. In prosecuting Campbell and Drake for the murder of Mr. Eberhart, the prosecutor changed his theory of what happened to suit the state. This distortion rendered Henry Drake's trial fundamentally unfair.

APPENDIX D

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk
50 Spring Street S.W.
Atlanta, Georgia 30303-3147

July 23, 1985

Spencer D. Mercer
Clerk

In Replying Give Number
of Case and Names of Parties

TO ALL PARTIES LISTED BELOW:

NO. 83-8047—HENRY ARTHUR DRAKE v. RALPH KEMP (DC No. 82-99-ATH)

The enclosed order has this day been entered on petition( ) for rehearing. See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

By: /s/ Angela L. Bickers
Deputy Clerk

cc: Ms. Mary J. Wilkes
Ms. Susan V. Boleyn
Ms. Paula K. Smith

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8047

HENRY ARTHUR DRAKE,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING
(Filed July 23, 1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 85-556

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

vs.

HENRY ARTHUR DRAKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Certiorari is warranted where the Court of Appeals for the Eleventh Circuit conscientiously followed and correctly applied the holdings of this Court to each of the issues on which it granted relief to Respondent.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT (REASONS FOR DENYING THE WRIT)

I. AS THE ELEVENTH CIRCUIT HELD, THERE ARE NO CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN THE CHARGE GIVEN ON INTENT IN THIS CASE AND THE CHARGE FOUND TO BE CONSTITUTIONALLY IMPERMISSIBLE IN FRANCIS V. FRANKLIN, ___U.S.___, 105 S.Ct. 1965 (1985), AND, THUS, THERE IS NO NEED OR REASON FOR THIS COURT TO GRANT CERTIORARI, AS THE STATE REQUESTS, TO "DETERMINE THE PARAMETER OF FRANCIS V. FRANKLIN.....7

II. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE HARMLESS ERROR RULE OF CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967), TO THE FACTS OF THIS CASE AND FOUND THE SANDSTROM ERROR NOT TO BE HARMLESS. THUS, THERE IS NO NEED OR REASON FOR THIS COURT TO GRANT CERTIORARI ON THIS ISSUE.....8

III. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE HOLDINGS OF THIS COURT TO THE FACTS OF THE CASE AND PROPERLY FOUND THAT THE PROSECUTOR'S CLOSING ARGUMENT IN THE PENALTY PHASE RENDERED THE PROCEEDING SO FUNDAMENTALLY UNFAIR THAT DUE PROCESS REQUIRES A NEW SENTENCING TRIAL. THUS, REVIEW BY THE COURT OF THIS ISSUE IS NOT WARRANTED.....11

CONCLUSION.....12

CERTIFICATE OF SERVICE.....14

TABLE OF AUTHORITIES

	Page(s)
Chapman v. California, 386 U.S. 18 (1967).....	5,8,10
Connecticut v. Johnson, 460 U.S. 83 (1983).....	4,8,9,10
Cupp v. Naughten, 414 U.S. 141 (1973).....	3,7,8
Davis v. Kemp, 752 F.2d 1515 (11th Cir. 1985).....	8
Donnelly v. DeChristoforo, 416 U.S. 637 (1974).....	6,11
Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985).....	2,3,5,7,9, 10,11,12
Francis v. Franklin, ___U.S.___, 105 S.Ct. 1965 (1985).....	3,4,7
Sandstrom v. Montana, 442 U.S. 510 (1979).....	3,4,5,8, 9,10

NO. 85-556

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

vs.

HENRY ARTHUR DRAKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Henry Arthur Drake, respectfully prays that the State's Petition for Writ of Certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit be denied.

STATEMENT OF THE CASE

The Respondent is in agreement with the State's presentation of the legal history of this case. However, Respondent strongly contests the State's alleged "review of the evidence presented at Respondent's trial." What is contained in the State's statement of the case is not a review of the evidence presented at trial, but rather a totally one-sided and misleading representation of the evidence which recites only that evidence which is favorable to the State's position and which

totally ignores the evidence supporting the Respondent's position and the Eleventh Circuit decision. Thus, a more thorough review of the facts is necessary to this proceeding.

The State's recitation of the facts in this case gives the impression that, based on the evidence, there was no doubt that Mr. Drake committed the murder and armed robbery for which he is presently confined on Georgia's death row. However, as the Eleventh Circuit Court of Appeals was careful to point out, the record actually reflects "considerable controversy over who was the perpetrator of the crimes". Drake v. Kemp, 672 F.2d 1449, 1455, State's Appendix, p. 52. Indeed, in his concurring opinion in Drake v. Kemp, Judge Clark sets out in detail the extensive record below which indicates that Mr. Drake, true to his word at trial, was not guilty of the armed robbery and murder of which he presently stands convicted. Id., at 1470-1476; State's Appendix, pp. 90-105. In the interest of brevity and in order to avoid undue duplication, Respondent respectfully incorporates by reference, as a part of his statement of the case, the summary of the evidence as presented by Judge Clark in the above-cited portions of Drake v. Kemp and urges the Court to review this summary, as well as the brief summary made in the majority opinion at p. 1454 (State's Appendix, pp. 50-51), to obtain a much more thorough and accurate portrayal of the evidence.

A very brief synopsis of the evidence ignored by the State established that Mr. Drake and his girlfriend dropped William Campbell, Drake's co-defendant, off at the barbershop where the crime occurred on the evening the crimes were committed. Drake, his girlfriend and several family members testified that Drake and the girlfriend then drove to Drake's parents house nearby, where they were having dinner and were visiting during the time it was established that the crimes took place. Later, Drake and his girlfriend returned and picked Campbell up across the street from the barbershop and drove back to their own

house in another community. Thus, while Drake clearly transported Campbell to and from the scene of the crimes, his intent in doing so was critically in dispute. See, Drake v. Kemp, 762 F.2d 1449, 1454; State's Appendix, pp. 50-51.

The trial court charged the jury on three theories of murder - malice murder, felony murder and aiding and abetting - and instructed the jury that under either theory they could find Mr. Drake guilty of the murder and armed robbery. After over six hours of deliberation, the jury returned a general verdict of guilty.

Several years after the trial, Campbell recanted entirely the testimony he had given against Drake. Campbell's testimony had been the only evidence at Drake's trial implicating him in the crimes.

The issue of Mr. Drake's innocence has been properly raised at every stage of his appeals. However, the en banc Eleventh Circuit Court declined to rule on this issue due to its reversal of the convictions based on the Sandstrom issue in the case.

SUMMARY OF THE ARGUMENT

For the following reasons, review of this case on certiorari is neither warranted under the usual considerations governing review on certiorari as outlined in Rule 17 of this Court nor is such review a desirable exercise of the Court's discretion:

I. The Sandstrom Violation

The Eleventh Circuit held that the charge given on intent in this case was virtually identical and constitutionally indistinguishable from the charge found by this Court to be impermissibly burden-shifting in Francis v. Franklin, ___U.S.__ , 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

In reaching its decision, the Eleventh Circuit considered the trial court's instructions as a whole, as required by Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), to determine whether the erroneous charge was cured by any additional instructions from the Court.

After a careful review of the entire jury charge, and specifically employing the analysis set forth by this Court in Francis v. Franklin, supra, the Eleventh Circuit concluded that the additional language was not curative and that the challenged instruction violated Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 61 L.Ed.2d 39 (1979)

In that the Eleventh Circuit meticulously and faithfully adhered to the applicable law of this Court in reaching its ruling on this issue, certiorari is neither warranted nor desirable.

II. The Harmless Error Question

Having determined that there was a Sandstrom violation, the Eleventh Circuit went on to hold that, under the facts of this case, the Sandstrom error was not harmless.

In making its harmless error determination, the Court properly applied the standards prescribed by both the plurality and dissenting opinions of this Court in Connecticut v. Johnson, 460 U.S. 83 (1983), and held that, under either standard, the Sandstrom error was clearly harmful in this case. The Court's harmless error analysis involved two questions: (1) whether the evidence of intent was overwhelming, and (2) whether the instruction concerned an element of the crime which was not put in issue at trial.

The Court first opined that had Respondent been tried only on the theory of malice murder, the Sandstrom error might well have been harmless because the evidence at trial as to the intent of the actual perpetrator to kill was overwhelming. Moreover, since Respondent presented an alibi defense to the actual killing, the instruction would not have affected the issue of the perpetrator's intent to kill.

However, the Court pointed out that Respondent was also tried for murder under an aiding and abetting theory, and that Respondent's potential liability as an aider and abetter was squarely before the jury and was the likely theory on which he

was convicted, given the jury's general verdict of guilty and the markedly non-overwhelming nature of the evidence implicating Respondent as the actual killer.

As to the Respondent's culpability for the murder under an aiding and abetting theory (i.e. the getaway man), the Court correctly noted that if the jury found Respondent guilty only on a theory of accomplice liability, then "the State's burden in the Sandstrom context would be to prove both that the actual killer, presumably [the co-defendant], intended to kill and that [Respondent] intended to aid and abet the crimes." (Emphasis in original). (Drake v. Kemp, 762 F.2d 1449, 1456 (1985); State's Appendix, p. 54).

The Court found that the erroneous intent instruction could have affected the jury's determination of whether Respondent intended to aid and abet the crimes and that that issue of intent was clearly before the jury.

Finding that the evidence of intent on this issue, which came solely from the co-defendant, was far from overwhelming, the Court concluded that the Sandstrom error was not harmless error in this case, under the standard set out in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 17 L.Ed.2d 705 (1967) (A criminal conviction must be reversed if the appellate court cannot say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24, 87 S.Ct. at 828).

The Eleventh Circuit having once again meticulously and carefully adhered to the prior decisions of this Court on this issue, review on certiorari is unwarranted and would be improvident.

III. The Improper Prosecutorial Argument

The Eleventh Circuit properly held that the argument of the prosecutor to the jury in the penalty phase of Mr. Drake's trial, in which he expressed the view that mercy was not an appropriate consideration in the exercise of the jury's

sentencing discretion and attributed that view to the State's highest Court, was improper in that it was misleading, affirmatively misrepresented the law and was prejudicial.

The Court correctly applied this Court's decision in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and held that, under the particular facts of this case (including the weakness of the evidence as to Mr. Drake's guilt), the extremely improper use of the century-old Georgia Supreme Court cases undermined confidence in the outcome of Respondent's sentencing proceeding and rendered that proceeding fundamentally unfair.

In that the Eleventh Circuit specifically based its decision of this issue on prior decisions of this Court, review on certiorari is, once again, both unwarranted and undesirable.

IV. Conclusion

It is clear from the foregoing that, with regard to each issue upon which the State seeks certiorari, the legal analysis employed by the Eleventh Circuit was absolutely correct and was in total accord with the prior holdings of this Court. Thus, all the State is really asking this Court to review are the results and findings unanimously reached by the Court of Appeals, which findings were based on the Court's careful review and analysis of the particular facts of this case. Respondent Drake respectfully submits that the State's disagreement with the factual findings and holdings of the Court of Appeals is simply not an appropriate or prudent reason for this Court to review this case on certiorari.

ARGUMENT
(REASONS FOR DENYING THE WRIT)

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THIS COURT'S ANALYSIS IN FRANCIS V. FRANKLIN, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), TO THE IMPROPER INTENT CHARGE IN THIS CASE AND DETERMINED THAT THERE ARE NO CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN THAT CHARGE AND THE CHARGE FOUND TO BE CONSTITUTIONALLY IMPERMISSIBLE IN FRANCIS V. FRANKLIN. THUS, THERE IS NO NEED OR REASON FOR THIS COURT TO GRANT CERTIORARI, AS THE STATE REQUESTS, TO "DETERMINE THE PARAMETERS OF FRANCIS V. FRANKLIN.

The State implores this Court to grant certiorari in order to narrow the application given to Francis v. Franklin by the Eleventh Circuit. It argues that the Eleventh Circuit looked only at isolated language in the jury charge and did not review the trial court's instructions as a whole, as required by Cupp v. Naughten, 414 U.S. 141, 146 (1973).

There is simply no basis for the State's request. The Eleventh Circuit specifically took note of the argument that the charge, as a whole, cured any particular potentially burden-shifting instructions. The Court unanimously held that when read as a whole a reasonable jury could still have interpreted the instructions as placing on the Mr. Drake the burden of proof on intent. The Court held:

> After a careful review of the entire jury charge, and employing the analysis set forth by the Supreme Court in Francis v. Franklin, we find that a reasonable juror could well have concluded that Drake bore the burden of proof on the necessary element of intent. The relevant portions of the jury instructions cannot be distinguished from the jury charge in Francis v. Franklin, which we find to be controlling. We thus conclude that the instructions violated Sandstrom. (Emphasis added).[1]

Drake v. Kemp at 1453; State's Appendix, p. 48.

Thus, it is clear that, contrary to the State's contentions, the Eleventh Circuit fully considered the burden-shifting charge on intent in the context of all other allegedly

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[1]Indeed, the supposedly "curative" language cited by the State (Petition for Writ of Certiorari, p. 15), though not verbatim the same as the ameliorative language considered in Francis v. Franklin, is, as the Eleventh Circuit found, "substantially identical." Drake v. Kemp at 1453; State's Appendix, p. 48. See, Francis v. Franklin, 85 L.Ed.2d 344 at 351-352 and 356-357.

curative instructions, as required by Cupp v. Naughten. Therefore, certiorari review is not warranted.

II. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE HARMLESS ERROR RULE OF CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967), TO THE FACTS OF THIS CASE AND FOUND THE SANDSTROM ERROR NOT TO BE HARMLESS. THUS, THERE IS NO NEED OR REASON FOR THIS COURT TO GRANT CERTIORARI ON THIS ISSUE.

Having determined that the charge given by the Court on intent violated Sandstrom, the Eleventh Circuit, after carefully analyzing the evidence at trial and the trial court's charge as a whole, concluded that the Sandstrom error was not harmless in this case.

The State seeks certiorari on this issue, erroneously asserting that intent was not an issue in the case and, thus, that the Sandstrom error was harmless. The State argues that because Respondent presented an alibi defense to the actual killing the question of intent was totally removed from the jury's consideration and, thus, that the Sandstrom error should have been found to be harmless under the rationale of the plurality decision in Connecticut v. Johnson, 460 U.S. 83 (1983). The State urges the Court to grant certiorari "to review the applicability of the harmless error rule to alleged Sandstrom violations, in situations in which a criminal defendant removes intent as an issue for the jury to determine, by means of the defense which is asserted by that defendant", thereby implying that the Eleventh Circuit ignored the exception noted in the plurality opinion of Connecticut v. Johnson. Petition for Writ of Certiorari, pp. 18-20.

In fact, the Eleventh Circuit decided the harmless error question by applying the standards outlined in both the plurality and the dissenting opinions in Connecticut v. Johnson. Specifically, the Court followed its previous decision in Davis v. Kemp, 752 F.2d 1515, 1520-21 (11th Cir. 1985), and considered the following two questions in making its harmless error analysis: (1) Was the evidence of intent overwhelming? and (2) Did the instruction concern an element of the crime which was

not put in issue at trial? These are precisely the issues for determining harmless error outlined by this Court in its various opinions in Connecticut v. Johnson.

The Eleventh Circuit correctly determined that while Mr. Drake did deny participating directly in the armed robbery and murder, and did present alibi witnesses in support of his denial of participation in the actual killing (the malice murder), he admitted certain acts (e.g., driving the co-defendant to and from the scene) which, when combined with proper proof of intent, could have supported a guilty verdict based on aiding and abetting the crimes.

With this evidentiary background, the Eleventh Circuit first noted that, under the facts, there was overwhelming evidence that the actual perpetrator of the murder intended to kill the victim. Having made that determination, the Court opined that:

> If malice murder were the only theory asserted by the State, or the only theory submitted to the jury, we would conclude that the erroneous intent instruction was harmless on these facts. Under the malice murder theory, the only issue for the jury would have been whether Drake was present in the barber shop, as Campbell testified, or elsewhere, as Drake testified, and the questioned instruction could have had no bearing on this issue.[2]

Drake v. Kemp at 1455; State's Appendix, pp. 52-53.

However, as the Court correctly noted, "malice murder was not the only theory submitted to the jury. A prominent part of the prosecutor's case was the theory of accomplice liability." Drake v. Kemp at 1455; State's Appendix, p. 53. Under the evidence presented at trial (including Drake's own testimony), as well as the arguments of counsel and the trial court's charge, "the choice to convict Drake of armed robbery and murder solely on the basis of Drake's aiding and abetting the

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[2]Thus, the Court held, consistently with both the plurality and dissenting opinions in Connecticut v. Johnson, that the issue of intent was not before the jury and therefore the Sandstrom violation was harmless as to this theory, but only this theory, of the crime.

crimes committed by Campbell was squarely before the jury." Drake v. Kemp at 1456; State's Appendix, p. 56.

Under Georgia law, a conviction for murder on an aiding and abetting theory requires a finding of intent to aid and abet. Drake v. Kemp at 1455-1457; State's Appendix, pp. 52-57. The Eleventh Circuit, thus, correctly ruled that "[i]f the jury found Drake guilty on a theory of accomplice liability, then it is clear that the State's burden in the Sandstrom context would be to prove both that the actual killer, presumably Campbell, intended to kill, and that Drake intended to aid and abet the crimes." Drake v. Kemp at 1456; State's Appendix, p. 54.

Having found that "aiding and abetting must be intentional" and that "that intent element could have been affected by the erroneous burden-shifting instruction on intent" (emphasis added), the Eleventh Circuit correctly determined that the final issue before it with regard to whether the Sandstrom error was harmless was "whether there was overwhelming evidence that Drake intended to aid and abet the crimes." (Emphasis in original). The Court concluded that "[t]he only evidence on this issue came from Campbell, which falls far short of constituting overwhelming evidence." Drake v. Kemp at 1457; State's Appendix, p. 56.

Accordingly, having determined that, under the peculiar facts of the case, intent (at least with regard to aiding and abetting) was an issue in the case, whether or not the Respondent asserted an alibi defense to the actual killing, and that there was not overwhelming evidence th Drake intended to aid and abet the crimes, the Eleventh Circuit concluded that under the Chapman harmless error standard, the Sandstrom error was not harmless beyond a reasonable doubt.

As the plurality in Connecticut v. Johnson held, presenting an alibi defense "may in some cases" concede the question of intent. Id., 74 L.Ed.2d 823 at 834 (Emphasis added). However, contrary to the State's argument, asserting an alibi defense

does not in all cases concede the issue of intent. This case is, as the Eleventh Circuit properly held, a case in which, under its peculiar facts, intent remained a crucial issue to be determined by the jury.

In that the Eleventh Circuit carefully and painstakingly analyzed the harmless error question in accordance with the law of this Court, review of the Eleventh Circuit's decision on this issue is not warranted.

III. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE HOLDINGS OF THIS COURT TO THE FACTS OF THE CASE AND PROPERLY FOUND THAT THE PROSECUTOR'S CLOSING ARGUMENT IN THE PENALTY PHASE RENDERED THE PROCEEDING FUNDAMENTALLY UNFAIR. THUS, REVIEW BY THE COURT OF THIS ISSUE IS NOT WARRANTED

Once again, the State would have this Court believe that the Eleventh Circuit ignored applicable Supreme Court law, specifically Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), in deciding that the prosecutor's closing argument in the penalty phase violated due process. Once again, nothing could be more untrue. Contrary to the State's contention, the Court of Appeals specifically employed and correctly applied the "fundamental fairness" test prescribed by this Court in Donnelly v. DeChristoforo in ruling in Respondent's favor on this question.

The Court first correctly determined that the argument was, without question, improper. Specifically, the Court concluded that the prosecutor's argument that mercy was an inappropriate consideration for the exercise of the jury's sentencing discretion and his attribution of that view to the State's highest court was "misleading, legally incorrect and prejudicial." Drake v. Kemp at 1460; State's Appendix, p. 65. Under Georgia's capital sentencing scheme, the jury is required by law to decide whether or not to be merciful, even if it finds beyond a reasonable doubt the presence of the required aggravating circumstances. Thus, even to imply to the jury that mercy is contrary to the law or is disapproved by the Supreme Court of Georgia "strikes at the core of the jury's role in

capital sentencing" and is "fundamentally opposed to current death penalty jurisprudence." Drake v. Kemp at 1460; State's Appendix, p. 66.

The Court then set out to determine "whether there was a reasonable probability that the improper argument changed the jury's exercise of discretion in choosing between life imprisonment and death." Drake v. Kemp at 1460; State's Appendix, p. 65. Noting the weakness of the case against Drake and the difficulty the jury had in finding him guilty, the Court concluded:

> "Under all the circumstances of this case, [the prosecutor's] extremely improper use of the century-old Georgia Supreme Court cases to suggest the impropriety of mercy 'undermine[s] confidence in the outcome' of his sentencing proceeding."

And, further:

> "...that the improper argument rendered Drake's sentencing proceeding fundamentally unfair."

Drake v. Kemp at 1461; State's Appendix, p. 67.

As with the other two issues presented by the State's Petition for Writ of Certiorari, the Eleventh Circuit conscientiously and correctly adhered to the law of this Court in reaching its decision and, thus, certiorari in this case is unnecessary, inappropriate and inadvisable.

IV. CONCLUSION

It is clear from the foregoing argument that, with regard to each issue upon which the State seeks certiorari, the legal analysis employed by the Eleventh Circuit was absolutely correct and was in total accord with the prior holdings of this Court. Thus, all the State is really asking this Court to review are the results and findings unanimously reached by the Court of Appeals, which findings were based on the Court's careful review and analysis of the particular facts of this case. Respondent Drake respectfully submits that the State's disagreement with the factual findings and holdings of the Court of Appeals is simply not an appropriate or prudent reason for this Court to review this case on certiorari.

For all the foregoing reasons, Respondent respectfully requests that the State's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served Susan V. Boleyn, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334 with a copy of the within and foregoing Brief in Opposition to Petition for Writ of Certiorari by depositing same in the U.S. Mail in a properly addressed envelope with sufficient postage affixed thereon to assure delivery.

This 30th day of October, 1985.

Mary J. Wilkes